Supreme Court, U.S.
FILED

93 1212 JAN 18 1994
No. _____

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In The

Supreme Court of the United States

October Term, 1993

ROBERT GRAVES,

Petitioner,

versus

THE UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

LEWIS O. UNGLESBY
KARL J. KOCH
UNGLESBY & KOCH
246 Napoleon Street
Baton Rouge, Louisiana 70802
Telephone: (504) 387-0120

Attorneys for Petitioner, Robert Graves

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a defendant's unsuccessful opposition to the government's pretrial motion in limine is sufficient to preserve an evidentiary issue for appeal, absent a second contemporaneous objection or offer of proof regarding the same evidence during the trial?

2. Whether a two point upward adjustment in sentencing for obstruction of justice under United States Sentencing Guidelines Section 3C1.1 can be supported by inference or speculation that the accused attempted to suborn perjury before the Grand Jury, absent any evidence as to the falsity or materiality of the testimony which was allegedly sought?

PARTIES

The parties appearing in the United States Court of Appeals for the Fifth Circuit were Robert Graves, defendant and appellant below, and the United States of America, appellee below.

The petitioner for this writ of certiorari is Robert Graves. The respondent is the United States of America.

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OPINIONS BELOW

The Opinion of the Court of Appeals for the Fifth Circuit is reported at 5 F.3d 1546 (5th Cir. 1993). (Appendix Ex. A)

The Verdict from the United States District Court for the Middle District of Louisiana is unpublished, Criminal Number: 91-73-A-2. (Appendix Ex. B)

STATEMENT OF JURISDICTION

This Federal criminal action was initiated in the United States District Court for the Middle District of

Louisiana. Appeal was taken to the United States Court of Appeals for the Fifth Circuit, where judgment was entered October 20, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Sixth Amendment, Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

2. Federal Rules of Evidence, Rule 103:

> (a) **Effect of erroneous ruling**. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (b) **Objection**. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(c) **Offer of proof**. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

3. Federal Rules of Criminal Procedure Rule 51:

(a) Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which that party desires the court to take or that party's objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice that party.

4. Federal Sentencing Guidelines, Section 3C1.1:

(a) If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

Application Note 1: . . . In applying this provision to alleged false testimony or statements by the defendant, such testimony or statements should be evaluated in a light most favorable to the defendant.

———————♦———————

STATEMENT OF THE CASE

A. The Redacted Plea Agreement

ROBERT GRAVES was tried in United States District Court for the Middle District of Louisiana and convicted of conspiracy to defraud the United States and Internal Revenue Service in violation of 18 U.S.C. Section 371. He was sentenced to 21 months confinement, a $25,000 fine, and 3 years supervised release.

Myron Palermo was one of the principal witnesses for the prosecution. Palermo testified in compliance with the terms of a plea agreement from another District, which in part provided that if requested, he would submit to polygraph testing. (Appendix Ex. D). Prior to trial, the United States moved in limine (Appendix Ex. E) to remove the language regarding polygraph testing from the plea agreement, seeking to present only a redacted version of the plea agreement to the jury and to prohibit any questioning of Palermo as to the original terms of his agreement with the government.

Defendant filed an opposition to the motion (Appendix Ex. F) and presented argument to the court (Appendix Ex. G). Defendant maintained that all of the terms of Palermo's plea agreement should be presented to the jury, and that the government should not be able to avoid any of the implications of its bargain. Despite defendant's written and oral objections, the motion in limine was granted by the court, and defendant was prohibited from making any reference to the provisions of the plea agreement at trial. Given the nature of the court's ruling and the full airing of defendant's objection, defendant believed the issue had been preserved.

At trial, the Government examined Myron Palermo extensively, and his testimony proved to be pivotal in the success of its case against Robert Graves. The Government read and entered into the record the contents of the redacted plea agreement. (Appendix Ex. H). The United States then asked Palermo the following questions regarding his plea agreement:

> Q. TAKE A LOOK AT PARAGRAPH EIGHT, SIR. THIS IS THE ENTIRE PLEA AGREEMENT BETWEEN THE DEFENDANT, MYRON J. PALERMO, AND THE UNITED STATES, AND IS ENTERED INTO FREELY, VOLUNTARILY, AND UPON ADVICE OF COUNSEL, SIGNED THIS 16TH DAY OF JUNE, 1989, AT LAKE CHARLES, LOUISIANA, AND YOU HAVE IDENTIFIED YOUR SIGNATURE; IS THAT CORRECT, SIR?
>
> A: YES, SIR, THAT IS CORRECT.
>
> Q: *DO YOU HAVE ANY OTHER AGREEMENTS WITH THE WESTERN DISTRICT OF THE UNITED STATES?*
>
> A: *THIS IS THE ONLY AGREEMENT I HAVE WITH THE WESTERN DISTRICT OF THE UNITED STATES, SIR.*

(Appendix Ex. H, App. 220) (emphasis added). This was flatly untrue, as Palermo had actually agreed to be subject to polygraph testing, in addition to the terms the jury heard. The United States knowingly elicited false testimony, and the defendant had no option but to sit and listen.

Defendant made no objection during the trial to the use of the redacted plea agreement, believing that objection to a fully argued and decided issue would be both redundant and disrespectful to the Judge, and that in reality no objection was possible; the evidence had been ruled admissible.

Defendant raised the issue of the use of the redacted plea agreement on appeal to the Fifth Circuit Court of Appeals. The Court in its opinion (Appendix Ex. A) held that the defendant had not adequately preserved the issue for appeal absent an additional, contemporaneous objection to the plea agreement during trial, consequently applying a plain error standard of review. The Court relied on *United States v. Estes*, 994 F.2d 147 (5th Cir. 1993) (per curiam), decided *after* trial in this matter, which ruled for the first time in that Circuit that a defendant's objection to a government motion in limine to exclude evidence did not preserve the issue for review. The Court did acknowledge that other circuits recognize thoroughly argued pretrial motions made over strong objection as sufficient to preserve the objection for the appeal. The Court also found that defendant should have objected to the false testimony of Palermo (presumably after it had been given, since before Palermo spoke his answers nothing false was put forward).

B. The Sentencing Guideline Adjustment

ROBERT GRAVES was sentenced to twenty-one months confinement, a $25,000.00 fine, a special assessment of $50.00, and three years of supervised release. This sentence was calculated with a two-point level

increase imposed by the District Court, based on the court's finding that the defendant engaged in "obstruction of justice", as authorized by United States Sentencing Guidelines Section 3C1.1. The upward adjustment was based on an allegation that defendant had attempted to suborn perjury before the Grand Jury. The Court relied on the testimony of Joe Palermo, who testified regarding a conversation he had with the defendant, concerning the defendant's C.P.A.'s recent testimony before the Grand Jury, and Myron Palermo's upcoming appearance before that same Grand Jury:

> Q. AS YOU SIT HERE TODAY, CAN YOU RECALL WHAT MR. GRAVES TOLD YOU EXACTLY? CAN YOU RECALL EXACTLY WHAT HE TOLD YOU?
>
> A. NO, SIR, I CAN'T RECALL EXACTLY. IT WAS SOMETHING TO THE SENSE THAT HIS C.P.A. HAD SAID THIS, AND TO TELL MY BROTHER THAT HIS C.P.A. HAD SAID THAT.

(Appendix Ex. I, App. 61). Joseph Palermo opined that defendant's purpose was to ensure "my brother would say the same thing the C.P.A. said." (Appendix Ex. I, App. 62). However, no evidence was ever offered to show (1) that the information defendant sought to pass on was false, or (2) that the information was material. The content of the information remains a mystery.

The appeals court affirmed after reviewing the sentencing under a clear error standard. The Court of Appeals stated that the trial court could "infer" the fact that the defendant attempted to suborn perjury, and that it may have "reasonably surmised" the defendant

intended to do so. The Court also stated that defendant "may have violated" a witness tampering statute, although defendant was not advised of this position in the pre-sentence report, which referred only to subornation of perjury, and that these possible but unproven acts were enough for the court to act upon when sentencing took place. (Appendix Ex. A, App. 18).

REASONS FOR GRANTING THE WRIT

I. THE FEDERAL CIRCUIT COURTS ARE CURRENTLY SPLIT ON WHETHER A DEFENDANT'S OPPOSITION TO THE GOVERNMENT'S PRETRIAL MOTION IN LIMINE, FOLLOWED BY ARGUMENT AND RULING ARE SUFFICIENT TO PRESERVE THE OBJECTION ON APPEAL

A. A number of the Circuits have recognized the practicality of allowing the oral and written opposition to pretrial motions to put all parties on notice of opposition to the ruling and intent to preserve the issue for appeal.

The Fifth Circuit, applying a rule created *after* defendant's trial, found that defendant had not adequately preserved his objection to the alteration of the plea agreement, and that by failing to object to the government's elicitation of false testimony, that objection was waived as well. Defendant followed the trial court's order, and as a result has been substantially prejudiced.

Some pretrial motions are more important than others; the consequences of the ruling may or may not be pivotal in the progression of the ensuing trial. In the heat

of pretrial posturing, the context and significance of the pretrial motions are well known to the parties and the court since they are there participating. The vigor of the opposition to a motion, both written and oral usually leaves little doubt as to the importance of the ruling to that party's case.

A number of circuits now recognize that, in the case of obviously important and extensively argued pretrial motions that are definitively ruled upon by the court, going through the motions of reviewing already well-known objections serves little purpose, and "may be a needless provocation to the trial judge, not to mention a distracting interruption during the trial." *United States v. Mejia-Alarcon*, 995 F.2d 982, 986 (10th Cir. 1993). In the words of the Tenth Circuit, "(w)hen counsel diligently advances the contentions supporting a motion . . . and fully apprises the trial judge of the issue in an evidentiary hearing, application of the rule [requiring parties to re-raise objections at trial] . . . make(s) little sense." *United States v. Sides*, 944 F.2d 1554, 1560 (10th Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 604, 116 L.Ed. 627 (1991). This approach is currently in use in the Third, Seventh, Eighth, Ninth and Tenth Circuits.

Allowing fully argued and ruled upon motions to be sufficient to preserve an issue for appeal squares with Fed. Rules Crim. Proc. Rule 51. F.R.Cr.P. 51, and its civil analog Fed. Rules Civ. Proc. Rule 46 are meant to eliminate the redundancy and delay inherent in re-raising issues already settled pretrial. The rules provide that a formal exception to an action by the court is unnecessary if the issue has already been briefed, considered and ruled on by the court. The Third Circuit has recognized

that this principle applies equally well to motions in limine, stating that "if an issue is fully briefed and the trial court is able to make a definitive ruling, then the motion in limine provides a useful tool for eliminating unnecessary trial interruptions." *American Home Assurance v. Sunshine Supermarket*, 753 F.2d 321, 324 (3rd Cir. 1985). When the court gives its consideration to a motion fully briefed and argued, objection to it at trial has been held to be in the nature of a formal exception. *Sprynczynatyk v. General Motors Corp.*, 771 F.2d 1112, 1118 (8th Cir. 1985). Like the formal exception, the renewed objection to a motion in limine ruling is being phased out as a needless formality. This should be uniform among the Circuits.

Federal Rules of Evidence Rule 103(a) supports this movement in the Circuits as well. Subsections (a)(1) and (a)(2) both use the phrase " . . . apparent from the context . . . " regarding both objections and offers of proof in evidentiary matters. Fed. Rules Evid. Rule 103, 28 U.S.C.A. This phraseology recognizes the truism that objections are simply evident from the nature and progress of judicial proceedings, and formal action is not always necessary to confirm this. Further, in the Advisory Notes on Subdivision (a), the objection must be "called to the attention" of the judge and opposing counsel. Fed. Rules Evid. Rule 103, Notes of Advisory Committee on 1972 Proposed Rules, Subdivision (a), 28 U.S.C.A. This is clearly accomplished in pretrial evidentiary hearings by exchange of briefs and argument before the judge. The Seventh Circuit has recognized this, unequivocally stating that a formal offer of proof need not be made, as long as the substance of and objection to the evidence are

known to the court and the parties. *United States v. Sweiss*, 814 F.2d 1208, 1211 (7th Cir. 1987). Without the flexibility inherent in F.R.E. Rule 103 to recognize objections from the context of the proceeding, including pretrial hearings, "the form of timely objection (would be exalted) over the substance of whether a proper objection has been made and considered by the court." *Palmerin v. City of Riverside*, 794 F.2d 1409, 1413 (9th Cir. 1986), (confirming that a well considered and ruled upon motion in limine preserves an issue for appeal for Federal Rules of Evidence Rule 103 purposes). Pretrial rulings on motions in limine accomplish all aspects of preserving issues for appeal: apprising the parties and the court of the nature of the issue, establishing the ruling as law for the case, and serving as a timely notification of opposition while the issue is fresh before the court. *Cook v. Hoppin*, 783 F.2d 684, 691 n.2 (7th Cir. 1986). This practical approach should be established as the rule in Federal Circuit Courts.

B. The Fifth Circuit rationale for requiring formal objection to preserve an issue for appeal is faulty, and has been rejected by other Circuits.

The reason advanced by the Fifth Circuit for not allowing motions in limine to preserve objections for appeal is its opinion that most motions in limine are based on hypothetical use or non-use of evidence, as a preemptive tool, and that the judge should be reminded by the opposing party during trial by formal objection so the judge may then reconsider his ruling in light of the developed trial proceedings. See Appendix A, App. 10, Opinion of the Court of Appeals for the Fifth Circuit, *U.S. v. Graves*, Number 92-9508.

This is precisely the reason other circuits have rejected the rigid rule requiring formal offers of proof. The rule in the 10th Circuit is that the judge should recognize from a motion in limine and the brief opposing it whether a fully considered ruling requires waiting until the issue comes up at trial, to gauge the effect or value of the evidence. He should, in that case, delay ruling. Alternatively, many motions in limine will not be affected by evidence introduced during trial, and can be decisively ruled upon by the judge based on the briefs and discussion in the hearing. *American Home*, 753 F.2d, at 324. This is a distinction that other circuits require their judges to make, and the result is that "the motion in limine provides a useful tool for eliminating trial interruptions." *Id.*, at 324.

The other main drawback of a rigid rule requiring formal objection to preserve appeal is that counsel, who must depend on definitive pretrial rulings as the rule of law for the case, may be trapped when, for example, an unsuccessful motion in limine is not re-raised or, as in this case, an objection to an opponent's motion in limine which has been definitively and finally granted is not re-asserted. This situation could "bar an appeal of a meritorious issue on essentially technical grounds." *Palmerin*, 794 F.2d, at 1413 (rejecting the strict rule of the Fifth Circuit in favor of the flexible Third Circuit); *Mejia-Alarcon*, 982 F.2d, at 986.

Significantly, the Fifth Circuit urged eventual review of its inflexible policy of requiring formal objection. (Appendix Ex. A, App. 12)

In the instant case, the motion in limine by the United States (Appendix E) is one redacting a plea agreement to exclude its polygraph clause. Regardless of the merits of the motion, this ruling is not one that will be undercut by the development of evidence at trial, requiring reconsideration by the judge. It was briefed by both sides, argued, and ruled upon by the judge with no indication that the ruling w s conditional. *Sprynczynatyk*, 771 F.2d at 1118. The nature of this ruling simply falls outside of the contingency the Fifth Circuit rule prepares for, that trial circumstances may require a judge to reverse himself on a pretrial ruling.

The briefs by both parties (Appendix E and F), the hearing held, the unqualified nature of the judge's ruling and the fact that the motion is one that would be unaltered by trial developments, make this ruling fall more appropriately under the analysis of the circuits who employ the flexible rule: that appeals can be preserved by definitively ruled upon motions in limine because revisiting the issue at trial is simply unnecessary. This Court should so find in this case, and make this the uniform rule of the Federal Circuits.

C. Defendant's objection to the Trial Court's ruling on the motion In Limine to redact the plea agreement was properly reserved for appeal, and since a substantial right of the Defendant was affected, the ruling should be reversed.

In finding that the defendant has properly preserved the issue of the redacted plea agreement for appeal, this Court must then review the ruling of the lower courts

based upon the standard of Federal Rules of Evidence Rule 103(a). This requires a determination of whether a "substantial right of the party is affected." Federal Rules of Evidence Rule 103, 28 U.S.C.A. The Fifth Circuit, without deciding the issue, suggested that no significant prejudice occurred.

The right affected here is the right of witness confrontation found in the Sixth Amendment to the Constitution of the United States.

The Sixth Amendment right of witness confrontation has been held to include the right to impeach credibility through cross-examination. *Davis v. Alaska*, 415 U.S. 308, 315-16, 94 S.Ct. 1105, 1110-11, 39 L. Ed.2d 347 (1974). Although the judge may regulate cross-examination "especially broad latitude should be afforded" when the questioning involves the plea agreement of a government witness. *United States v. Barrett*, 766 F.2d 609, 614 (1st Cir. 1985); *United States v. Lynn*, 856 F.2d 430, 433 (1st Cir. 1988). More specifically, in *Lynn*, the First Circuit held that cutting off any examination of a government witness regarding polygraph testing as part of his plea agreement with the Government, was an abuse of the court's discretion, and impaired the constitutional right to confront witnesses. *Id.*, at 434.

This is the situation in the instant case. The United States wrote the plea agreement Myron Palermo signed. That agreement included a clause that Palermo would submit to polygraph testing if the United States so chose. The polygraph clause was present because the United States simply did not trust its own witness. However, the trial court allowed this clause to be removed, and

allowed the plea agreement to be presented to the jury in such a way that it appeared that the United States never had qualified their trust of Myron Palermo. Furthermore, the government was allowed to solicit known false testimony from the witness, by telling the jury that the agreement read to them was the entire agreement and that the witness had no other agreements with the United States. The defendant was completely foreclosed from any mention of the true nature of the plea agreement and the United States' distrust of their key witness. The result was an improperly enhanced presentation of the credibility of Myron Palermo, the witness on whose testimony the United States' case hinged.

The fact that the polygraph clause was never exercised is irrelevant. *United States v. Mayer*, 556 F.2d 245, 249 (5th Cir. 1977). What matters is that the existence of the polygraph clause positively proves that the United States did not trust Myron Palermo, something that Palermo's prior convictions and other facts presented regarding his past do not address.

The bottom line is that "[d]efense counsel must be given a maximum opportunity to test the credibility of the witness". *Burr v. Sullivan*, 618 F.2d 583, 587 (9th Cir. 1980), quoting *United States v. Brady*, 561 F.2d 1319, 1320 (9th Cir. 1977). This maximum degree of access to issues of credibility is "especially appropriate when the key witness is an accomplice of the accused." *Burr*, 618 F.2d at 587. Bob Graves was simply denied access to a critical issue of credibility regarding a pivotal government witness. This violates his Sixth Amendment right to confront the witness against him and satisfies the Federal Rules of Evidence Rule 103(a) requirement that a substantial right

be affected to warrant reversal of an evidentiary ruling, and this Court should so find.

II. THE DISTRICT COURT IMPOSED A TWO-POINT INCREASE IN DEFENDANT'S SENTENCING GUIDELINE SCORE FOR OBSTRUCTION OF JUSTICE BASED ON AN ALLEGATION THAT DEFENDANT SUBORNED PERJURY, WITH NO EVIDENCE AS TO THE TRUTH OR FALSITY, OR THE MATERIALITY, OF THE TESTIMONY ALLEGEDLY SOUGHT BY THE DEFENDANT

A. The alleged causes for the Court's increase in sentencing level were only obliquely referenced during trial, with no exploration or evidence taken as to whether the acts were actually committed.

It is well established that the party seeking an upward adjustment in sentence level bears the burden of proving by a preponderance of the evidence the facts necessary to support the adjustment. *United States v. Alfaro*, 919 F.2d 962, 965 (5th Cir. 1990); *United States v. Kim*, 963 F.2d 65, 69 (5th Cir. 1992). In this case, Bob Graves' guideline level was increased by two points because he allegedly obstructed justice by suborning the perjury of another witness. The increase was sought by the United States. Yet the United States offered no evidence at all that the defendant suborned perjury.

Testimony was elicited by the prosecution that the defendant told Joe Palermo, a government witness, that the defendant's C.P.A. had testified before the Grand Jury. Palermo testified that the purpose of the defendant's call was to relate the substance of the C.P.A.'s testimony

to Palermo, to be given to Palermo's brother, who was scheduled to testify before the same Grand Jury so that the testimony would be consistent. (Appendix Ex. I. The substance of what was said, false or truthful, was never shown by the United States. The materiality or lack thereof was never addressed. This single exchange was the basis for the two-point Federal Sentencing Guidelines increase under Section 3C1.1 imposed by the trial judge. (Appendix Ex. J).

B. The Appellate Court approval of a speculation and inference standard falls below the standard of proof that acts were committed justifying an increase in sentence level.

The United States simply did not meet its burden of proof to show that Bob Graves suborned perjury. The only thing proven by the testimony is that Joe Palermo believed that defendant wanted Myron Palermo's and the C.P.A.'s testimony to be consistent. Instead of suborning perjury, it is equally plausible that, given Palermo's criminal background, the defendant wanted to ensure that Palermo did not commit perjury by testifying differently from the C.P.A. Any number of explanations can be read into Joe Palermo's cryptic and hazily remembered testimony, and the truth does not preponderate toward any one of them. Application Note 1 of the United States Sentencing Guidelines Section 3C1.1 states: "In applying this provision to alleged false testimony or statements by the defendant, such testimony should be evaluated in a light most favorable to the defendant." This clearly was not done in this case.

Even if the judge agreed with the United States' interpretation of the defendant's actions, the United States is not relieved from initially proving its allegations if it is the proponent of the increase. *United States v. Ransom*, 990 F.2d 1011, 1014-15 (8th Cir. 1993); *United States v. Jackson*, 990 F.2d 251, 253 (6th Cir. 1993). Such unproven allegations cannot serve as the basis for enhancement. *Id.*, at 1014. A recent case by this Court dealing with the defendant's perjury states that an enhancing judge "should address each element of the alleged perjury in a separate and clear finding." *United States v. Dunnigan*, ___ U.S. ___, 113 S.Ct. 1111, 122 L. Ed.2d 445, 454 (1993). The facts simply are not present, nor were they at trial, to enable the judge to do that.

Since *no* evidence was ever put forward as to what Graves wanted related to Myron Palermo regarding the C.P.A.'s testimony, one can only speculate as to whether the information was false and material. Apparently, this speculation approach is approved by the Court of Appeals in this case, since they opined that the nature of the defendant's statements could be inferred or surmised. This is not the appropriate standard for a factual determination under the Sentencing Guidelines. The other possible bases for the upward adjustment raised by the Fifth Circuit are new; neither the parties nor the trial court suggested that a witness tampering statute provided a basis for the trial court's action. Of course, even if this was correct, defendant was not advised of this legal basis for an upward adjustment prior to sentencing.

C. Defendant was severely prejudiced by this incorrect application of Sentencing Guidelines.

Defendant, Bob Graves, received a two-point enhancement of his sentence based on unproven speculation. Since defendant received the maximum sentence for his guideline range, he was prejudiced by the decision. The Court of Appeals affirmed this, saying that, in effect, unsupported and unproved testimony can be interpreted through inference and assumption to increase a man's time in prison. Defendant respectfully submits that this is wrong. It is out of line with the Fifth Circuit's own guidelines for justifying sentence increases, and it is out of line with the requirement of this Court as stated in *Dunnigan*, and this Court should so find.

CONCLUSION

Wherefore, petitioner respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

UNGLESBY & KOCH

LEWIS O. UNGLESBY
KARL J. KOCH
246 Napoleon Street
Baton Rouge, Louisiana 70802
Telephone: (504) 387-0120

Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-9508

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ROBERT GRAVES,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Louisiana
(Filed Oct. 20, 1993)

Before KING and BARKSDALE, Circuit Judges, and DUPLANTIER,[1] District Judge.

BARKSDALE, Circuit Judge:

The critical issue before us turns on a party being required to object, or make an offer of proof, when the subject covered by a motion in limine arises at trial, in order to preserve the issue for appeal. This and several other evidentiary questions being the principal matters raised on appeal, Robert Graves challenges his conviction

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[1] District Judge of the Eastern District of Louisiana, sitting by designation.

and sentence for conspiracy to defraud the United States and Internal Revenue Service, in violation of 18 U.S.C. § 371. We AFFIRM.

I.

Graves was the Secretary of the Louisiana Department of Transportation and Development (DOTD) from 1984 to 1988. In late 1986, he contacted Joseph Palermo, a member of the State Mineral Board and businessman in Louisiana. The two had known each other since 1984; Palermo considered Graves a "very good friend".

Graves called on Palermo for help, telling him that he (Graves) had received income from a source he did not wish to reveal to the Internal Revenue Service. Graves stated that he owned property in Mississippi, and suggested that it might be used to help account for the income.

Joseph Palermo did not wish to become directly involved because of his position on the Mineral Board; thus, he asked his brother, Myron Palermo, to help Graves. Myron Palermo told Joseph Palermo, and later told Graves, that he would be willing to provide Graves an apparent source for the income.

The specific scheme to which the Palermos and Graves agreed was executed as follows: Backdated documents were created to show a sale of Graves' Mississippi property to Myron Palermo's company. Graves created backdated receipts for some $40,000 in payments towards the alleged purchase price. The receipts showed Myron Palermo's company as the party making the payments.

Two years later, when Myron Palermo was arrested for attempted distribution of marijuana, authorities recovered the false documents during a search of his business premises. Within a few days of the arrest, Joseph Palermo informed Graves about it and the document seizure. As agreed, they met to discuss how to "get[] the property back" in Graves' name. Graves then met with Myron Palermo, and instructed him to write a letter stating that he could not make the payments on the property and would be willing to return it to Graves. Graves also instructed him to execute a quitclaim deed returning the property to Graves. Myron Palermo did both, testifying that these documents were created so "it would look like it was a real transaction, which it wasn't."

Graves was indicted for both conspiracy to defraud the United States and IRS, in violation of 18 U.S.C. § 371, and making a false statement to the IRS (concerning different funds), in violation of 26 U.S.C. § 7206(1). He was convicted by a jury of the former and acquitted on the latter. His sentence included 21 months incarceration.

II.

A.

Graves bases error on the denial of his motion to strike language from the indictment, which suggested that he was selling his influence as a governmental official. He asserts that, instead of being tried as charged, he was tried for official corruption. Specifically, he contends that the conspiracy count should not have identified him as the Secretary of DOTD, and that the false statement

count should not have made reference to him selling his influence.[2] Similarly, he maintains that the district court should not have admitted evidence that he was engaged in official misconduct.

1.

The denial of a motion to strike is reviewed only for abuse of discretion. *United States v. Bullock*, 451 F.2d 884, 888 (5th Cir. 1971). For language to be struck from an indictment, it must be irrelevant, inflammatory, and prejudicial. *Id.*

Graves' contention that the reference to his official position in the conspiracy count should have been struck is without merit. First, the language is relevant to the identity of the defendant charged in the indictment. See *United States v. Reeves*, 892 F.2d 1223, 1228 (5th Cir. 1990) (recognizing that the "identity of the participants" in a conspiracy is relevant). Second, his occupation was relevant to prove the motive of the conspirators. Specifically,

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[2] Paragraph two of the conspiracy count stated:

> From in or about April 1984 to in or about March 1988, the defendant, ROBERT G. GRAVES, was the Secretary of the Department of Transportation and Development (DOTD) of the State of Louisiana.

The false statement count also recited that Graves was the Secretary of DOTD. In addition, it stated:

> In or about August 1986, the defendant, ROBERT G. GRAVES, accepted a substantial sum of money knowing it was paid to him for Graves' past assistance, and to influence Graves to continue to be of assistance, in connection with the obtaining of properties by the State of Louisiana through the DOTD.

the Palermos knew of Graves' position, and Graves advised Myron Palermo that he should call him (Graves) if "[Graves] could ever help me in any way". Evidence suggesting a motive for a crime is relevant. *See, e.g., United States v. Mennuti*, 679 F.2d 1032, 1037 (2nd Cir. 1982). (Nor is the language inflammatory or prejudicial.)

Likewise, we find no abuse of discretion concerning the contested language in the false statement count. The government was required to prove that Graves knew that his income exceeded that which he reported. *See* 26 U.S.C. § 7206(1). The specific allegation made in support of the false statement charge was that Graves peddled influence for cash. Of course, such an allegation may be somewhat sensational; but, that does not make it irrelevant.

2.

For the foregoing reasons, we also find no error in the admission of evidence on whether Graves was receiving unreported income through official misconduct.

B.

Graves next asserts that the district court improperly excluded evidence he sought to introduce to rebut the false statement charge. To prove this charge, the government alleged that a payment of $10,000 by Joseph Palermo to Graves was unreported income. Joseph Palermo testified that the money was given to Graves for his help in the DOTD's purchase of land from Joseph Palermo.[3]

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[3] The land was owned by Joseph Palermo and others.

And, a DOTD employee testified that Graves' actions in that transaction were not routine.

Graves presented evidence that he had done nothing to influence the acquisition; in fact, a defense witness testified that Graves' actions regarding the transaction were not unusual. Apparently, the jury credited Graves' explanation; he was acquitted on the false statement charge. Now, however, Graves contends that the trial court erred in excluding evidence he sought to introduce regarding the price paid by the State for other parcels of property. Through such evidence, Graves hoped to show that the price paid by the State to Joseph Palermo was not unusually high.

Insofar as Graves was acquitted on the false statement charge, even assuming error, it must be deemed harmless. *See* Fed. R. Crim. P. 52(a). In addition, we find no abuse of discretion in the district court's determination under Fed. R. Evid. 403 to exclude evidence on a plethora of land acquisitions by the State. *See* Fed. R. Evid. 103 ("[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected"); *United States v. Ackal*, 706 F.2d 523, 532 (5th Cir. 1983) (essaying abuse of discretion standard of review for limitations on the introduction of evidence); *see also United States v. Quintero*, 872 F.2d 107, 113 (5th Cir. 1989) (noting broad discretion of trial court in determining admissibility of evidence), *cert. denied*, 496 U.S. 905 (1990). Such evidence would have unduly consumed time and risked jury confusion on an issue of little, if any, relevance. It matters not whether Joseph Palermo received special treatment. What is relevant is whether he paid Graves in an effort to procure it.

C.

Graves next challenges the district court's allowing a portion of the government's plea agreement with Myron Palermo to be withheld from the jury. Before trial, the government filed a motion in limine to exclude the portion providing that Palermo would be subject to a polygraph examination. Graves unsuccessfully contested the motion, contending that such a limitation would be "contrary to the established standards of cross-examination and confrontation". At trial, a redacted version of the plea agreement was introduced; the polygraph clause was excluded.

According to the government, "[n]o polygraph examination of Myron Palermo was ever requested or conducted." Graves is not attempting to introduce polygraph results into trial; rather, he asserts that he should have been allowed to explore the implications of the government's inclusion of the polygraph clause in the agreement as an issue going to Myron Palermo's credibility. In addition, Graves complains that the government and Myron Palermo affirmatively misrepresented that the redacted agreement was the entire agreement, when Palermo, at the conclusion of an extended colloquy on the agreement, affirmed that it was the "entire" and "only agreement" he had with the government.

1.

For purposes of this appeal, we will assume that the district court erred in permitting the clause to be redacted. Also, we will assume that the offer made by the district court to Graves – that the clause could be left in,

but that Graves would not be permitted to ask questions about whether a polygraph examination was given and the court would issue a cautionary instruction – would not cure this error.

At trial, Graves did not object (renew his objection) to the introduction of the redacted agreement. Rule 103 requires that a timely objection be made; otherwise, we review only for plain error. *See* Fed. R. Evid. 103. Although it may seem redundant – as well as contrary to the underlying reasons for motions in limine – to require Graves to object at trial after having unsuccessfully opposed the motion in limine, we are bound by a recent decision by this circuit that plainly requires Graves to lodge a contemporaneous objection in order to preserve the issue for appeal. See *United States v. Estes*, 994 F.2d 147, 149 (5th Cir. 1993) (per curiam).

In *Estes*, a defendant planned to impeach the testimony of a prosecution witness by introducing a prior conviction. *Id.* at 148. The government moved successfully in limine to exclude evidence of the conviction, to which the defendant objected. *Id.* The *Estes* court recognized the settled rule of this circuit that a motion in limine does not preserve error for Rule 103 purposes; thus, " '[a] party whose motion in limine is overruled must renew his objection when the evidence is about to be introduced at trial.' " *Id.* at 149 (quoting *Wilson v. Waggener*, 837 F.2d 220, 222 (5th Cir. 1988)). Though recognizing that *Estes* presented the "opposite situation" – the appellant had contested a successful motion in limine – the *Estes* court saw "no reason why the same rule should not apply. [Appellant] should have attempted to

offer evidence of the conviction at trial to preserve this issue for appeal."[4] *Id.*

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[4] There is some tension between Estes and a prior decision by our court, *Collins v. Wayne Corp.*, 621 F.2d 777 (5th Cir. 1980). In Collins, a party moved in limine to prevent its opponent irom introducing a deposition of one of the movant's experts. *Id.* at 780. The district court received briefs on the issue; subsequently, it took the motion under advisement "until plaintiffs prepared to offer [the deposition] as part of their trial evidence." *Id.* At some point (perhaps at trial), the district court decided to admit the deposition, but it did impose restraints on the ability of the offering party to adduce additional facts about the deponent. See *id.* For that reason, the offering party chose to not offer the deposition into evidence. *Id.* at 781. On appeal, that party based error on the restraints imposed by the district court.

The party that had moved in limine to exclude the deposition asserted on appeal that the proponent of the deposition failed to preserve error, by failing to make an offer of proof at trial. *Id.* Our court, applying Rule 103, determined that the "function of an offer of proof is to inform the court what counsel expects to show by the excluded evidence." *Id.* (citation omitted). The court then determined that error was preserved because the motion in limine papers and briefs made "the substance of the deposition known" to the district court. *Id.*

Although, likewise, the district court knew the substance of the evidence excluded in the instant case, *Collins* is distinguishable. The district court in *Collins* apparently ruled on the admissibility of the deposition *at the time the deposition would have been offered at trial.* The instant case more closely resembles *Estes,* because the district judge was not given the opportunity at trial to reconsider his ruling on the exclusion of the polygraph clause. Indeed, *Collins,* in another section of the opinion, notes that "overruling of a motion in limine is not reversible error; only a proper objection at trial can preserve error for appellate review"; therefore, "a party whose motion in limine has been overruled must object when the error he sought to prevent with

One commentator advises that "where an objection [in the form of a motion in limine] has been sustained an offer of proof should be made at trial to make sure that appeal rights are preserved". See 1 John W. Strong et al., McCormick on Evidence § 52 at 203 (4th ed. 1992) (footnote omitted). This advice is well taken in this circuit. As discussed in note 4, *supra*, the rationale for requiring either a renewed objection, or an offer of proof, is to allow the trial judge to reconsider his in limine ruling with the benefit of having been witness to the unfolding events at trial.[5] See *Luce v. United States*, 469 U.S. 38, 41-42 (1984) ("The ruling is subject to change when the case unfolds. . . . Indeed even if nothing unexpected happens at trial, the district judge is free . . . to alter a previous in limine ruling."); *see also Collins*, 621 F.2d at 784 ("Motions in limine are frequently made in the abstract and in anticipation of some hypothetical circumstance that may not develop at trial.").[6]

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his motion is about to occur at trial." *Id.* at 784. The stated rationale is to "give the trial court an opportunity to reconsider the grounds of the motion in light of the actual – instead of hypothetical – circumstances at trial." *Id.* This rationale, discussed *infra* in the text, applies here.

[5] In this Case, the district court granted the government's motion in limine at a status conference prior to trial.

[6] Several circuits appear to follow our rule that, to preserve error for appeal, an objection or offer of proof as to the subject presented by a motion in limine must be made at trial. Those decisions do so in the context of an overruling of a motion in limine. *See, e.g., McEwen v. City of Norman*, 926 F.2d 1539, 1544 (10th Cir. 1991); *United States v. Roenigk*, 810 F.2d 809, 815 (8th Cir. 1987); *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1504 (11th Cir. 1985). Nevertheless, some circuits are acting to soften the rule. *See, e.g., United States v. Mejia-Alarcon*, 995 F.2d

Because Graves failed at trial to renew his objection (or offer the polygraph clause),[7] we apply the plain error standard of review. Fed. R. Evid. 103. Unless the error is "so obvious that our failure to notice it would seriously affect the fairness, integrity, or public reputation of judicial proceedings and result in a miscarriage of justice", we will not reverse the conviction. *United States v. Fortenberry*, 914 F.2d 671, 673 (5th Cir. 1990) (quoting *United States v. Graves*, 669 F.2d 964, 971 (5th Cir. 1982)), *cert. denied*, 111 S. Ct. 1333 (1991).

This case does not present such error. First, we question the utility of the polygraph clause for the defense. At oral argument, Graves recognized that the inferences that may be drawn from the clause could either credit or

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982, 986-88 (10th Cir. 1993) (adopting three-part exception to rule), *petition for cert. filed*, (U.S. Sept. 3, 1993) (No. 93-5876); *Greger v. International Jensen, Inc.*, 820 F.2d 937, 941-42 (8th Cir. 1987) (recognizing exception to general rule if trial court makes definitive ruling on motion before trial); *Palmerin v. City of Riverside*, 794 F.2d 1409, 1413 (9th Cir. 1986) ("where the substance of the objection has been thoroughly explored during the hearing on the motion in *limine*, and the trial court's ruling permitting introduction of the evidence was explicit and definitive, no further action is required to preserve for appeal the issue of admissibility of that evidence.")

[7] We recognize that Graves would have had to do so through a sidebar conference (on the record) or otherwise handle it outside the hearing of the jury; failure to do so would defeat the purpose of the in limine ruling. The flip side is, of course, that a trial judge should not be surprised, perturbed or annoyed when counsel makes an objection or offer of proof on an issue that the judge believes was disposed of by the in limine ruling; counsel is, at the very least, preserving the issue for appeal.

impeach Myron Palermo. Second, even assuming that the jury would have determined that the presence of the clause impeached Myron Palermo's credibility, the jury had before it other impeachment evidence insofar as he was concerned.

Specifically, the jury had the following information about Myron Palermo: (1) he pled guilty to a charge of conspiracy to possess with intent to distribute 2,000 pounds of marijuana; (2) he pled guilty to conspiracy to defraud the United States (money laundering); (3) he pled guilty to obstructing the United States Customs Service; (4) he had received substantially lighter punishment for these offenses because of his testimony against Graves; and, (5) he had lied originally to federal authorities concerning the documents at issue in the Graves case. As if this was not enough, the jury heard testimony that Myron Palermo was regarded in the community as untruthful. Highlighting this evidence of a reputation for untruthfulness, the district court specifically reminded the jury of it during its charge. In light of the abundant evidence Graves could have used to impeach Myron Palermo, the absence of the more speculative inferences that may have flowed from the polygraph clause falls far short of so infecting the judicial process as to require reversal under the plain error standard of review. (It appears that, even under the normal standard of review, Graves could not show reversible error. Accordingly, although we do not recommend en banc review in this case of our circuit's rule on renewing objections to in limine rulings, we urge that it do so in the appropriate case.)

2.

We can certainly understand Graves' concerns regarding the representation by the government that the redacted plea agreement was the "entire" or "only" agreement between it and Myron Palermo. Obviously, government counsel should not represent that a document is the "entire" agreement when, in fact, it is not (even when the only portion of the agreement not disclosed to the jury was subject to court-ordered limitation).[8] This notwithstanding, Graves' failure to make a contemporaneous objection to the questions concerning the entirety of the agreement dictates, again, review only for plain error.[9] *See* Fed. R. Evid. 103; *Fortenberry*, 914 F.2d at 673. And, the error was not "so obvious that our failure to notice it would seriously affect the fairness, integrity, or public reputation of judicial proceedings and result in a miscarriage of justice". *Id.*

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[8] We do not suggest that government counsel acted deliberately to distort the truth. Graves concedes that the prosecutor was not acting out of an "evil" intent.

[9] Graves asks "what the proper objection might be", stating that he could not object simply because "the witness is lying". Obviously, objection could have been lodged when the government asked if the redacted agreement was the "only" agreement between Myron Palermo and the United States. Counsel could have then noted that this conflicted with the actual agreement, and that the in limine ruling was preventing him from pointing it out on cross. Of course, as discussed *supra*, the basis for the objection could have been stated outside the hearing of the jury to prevent undermining the purpose of the motion in limine.

D.

Graves also contends that the district court erred in not excusing a juror who, on the last day of trial, reported to the district judge that her husband had been attacked while in a vehicle registered in the juror's name. The district judge in turn reported to trial counsel that "[s]he said I don't know what jury tampering is, judge, but you told me to report any unusual occurrence".[10] The juror also advised the district judge that she was neither unduly upset by the event nor had her fairness and objectivity been affected adversely. As the basis for contending that the district judge should have utilized an alternate juror, Graves asserts that the juror likely assumed Graves, and not the United States, was "connected with the incident."

For obvious reasons, the district court is afforded broad discretion in determining the impartiality of jurors; it is in the best position to observe their demeanor and credibility. *United States v. Hinojosa*, 958 F.2d 624, 631 (5th Cir. 1992). Accordingly, a ruling respecting such impartiality will not be set aside "absent a *clear* abuse of discretion." *Id.* (emphasis added).

In this case, the juror was questioned by the district court concerning the implications of the attack on her

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[10] During the trial, the judge had made the following statement to the jury:

> There's one more thing. If, during the course of the trial, anyone should come into the courtroom that you know or recognize, please let me know about that. Just call it to my attention and let me know about that, okay?

ability to fairly and thoroughly decide Graves' guilt or innocence. Apparently, the district court credited her testimony that the event would not diminish her impartiality. We will not second-guess the district court's determination on this matter.[11]

E.

Graves contends next that the district court erred by refusing to instruct the jury that the testimony of "immunized" witnesses (Joseph, Myron, and Anthony Palermo) should be "weighed by the jury with *greater* care and caution than the testimony of ordinary witnesses." (Emphasis added.)[12] The similar given instruction identified the three persons subject to immunity and plea agreements, explained the nature of the latter, and cautioned the jury that the testimony of witnesses who have entered plea or immunity agreements "is always to be received with caution and weighed or evaluated with

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[11] The government notes that the juror in question voted for acquittal on the false statement count. Obviously, this cannot be part of our calculus. *See United States v. Benavides*, 596 F.2d 137, 140 (5th Cir. 1979) (noting that the validity of a district court's exercise of discretion "does not turn on whether subsequent events prove or disprove" the court's judgment).

[12] Apparently, the three Palermo brothers entered into immunity agreements with the United States Attorney for the Middle District of Louisiana, where this case was tried. Only Joseph and Anthony Palermo entered into such agreements with the United States Attorney for the Western District of Louisiana; Myron Palermo entered into a plea agreement with that office.

great care." (Emphasis added.) In comparing the proposed and given instructions, Graves contends that the latter is "a mere truism", because "the testimony of every witness is 'weighed or evaluated with great care.' " Essentially, Graves complains that it was reversible error for the trial court to instruct the jury with the demonstrative "great", as opposed to the comparative "greater."

We disagree. Initially, we note that the district court "has broad discretion in formulating the charge so long as the charge accurately reflects the law and the facts of the case." *United States v. Allred*, 867 F.2d 856, 868 (5th Cir. 1989) (citation omitted). We will reverse a district court's refusal to give a proposed instruction only if "the instruction (1) is substantively correct; (2) was not substantially covered in the charge actually delivered to the jury; and, (3) concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense." *United States v. Grissom*, 645 F.2d 461, 464 (5th Cir. 1981); *see also Allred*, 867 F.2d at 868.

We agree with the district court that Graves' proposed instruction was substantially covered by those given. As noted, they specifically identified the witnesses who were under immunity or plea agreements, explained the implications of those agreements, and admonished the jury to consider those witnesses' testimony with "great care." The instructions, taken as a whole, *see United States v. Chavis*, 772 F.2d 100, 108 (5th Cir. 1985) (requiring that a jury charge "be considered as a whole"), implicitly compared these witnesses to the other witnesses and counseled caution. The court's decision to

forego use of the comparative form of the adjective "great" falls far short of reversible error.

F.

Finally, Graves maintains that the district court erred in imposing a two point upward adjustment of his sentence for obstruction of justice. This adjustment is authorized when a defendant engages in conduct which "obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense . . . ". U.S.S.G. § 3C1.1.[13] "Where a district court enhances a defendant's offense level on account of an obstruction of justice, the district court's finding of *obstructive conduct* is reviewed for clear error." *United States v. Pofahl*, 990 F.2d 1456, 1481 (5th Cir. 1993) (emphasis added), *petitions for cert. filed*, (U.S. Aug. 2, 4, 1993) (Nos. 93-5894, 93-5526).

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[13] Graves was sentenced in October 1992; thus, the guidelines in effect at that time can be found in the 1991 edition of the Federal Sentencing Guidelines Manual. Inexplicably, the probation officer utilized the 1988 edition. On appeal, we usually apply the guidelines in effect at the time of sentencing. *See United States v. Gonzales*, 996 F.2d 88, 90 n.3 (5th Cir. 1993). At any rate, Graves' contention fails under either edition. The only significant difference insofar as our subsequent discussion is concerned is that the 1988 edition's application notes do not include the witness tampering statute, 18 U.S.C. § 1512(b), as an *example* of conduct authorizing the adjustment. However, the 1988 application notes do recognize that the adjustment would be authorized if the defendant unlawfully attempted "to influence" a witness.

At trial, there was evidence that Graves knew that the government had discovered false sale records. Also, he knew that his accountant had testified before the grand jury regarding the alleged sale. Graves met with his accountant following his testifying before the grand jury and debriefed him on all the questions he had been asked and answers he had given. Graves then contacted Joseph Palermo and asked him to relay the testimony of the accountant to Myron Palermo, so that Myron Palermo's testimony would be consistent. As Joseph Palermo testified at trial, Graves wanted to make sure "my brother would say the same thing the CPA said."

The crux of Graves' assignment of error is that this evidence would not support a finding that he suborned perjury, because the truth of whatever Graves told Myron Palermo to say was not explored at trial. This contention fails for three reasons.

First, the district court, with its superior knowledge of the witnesses and proceedings, could well have *inferred* from these facts that Graves was attempting to suborn perjury; it may have reasonably surmised that the purpose of Graves' action was not to remind Myron Palermo to be consistent with the accountant on truthful matters. Admittedly, such an inference might not support a conviction for perjury under a beyond a reasonable doubt evidentiary standard; but, the standard of proof for sentencing issues is a preponderance of the evidence. *United States v. Buckhalter*, 986 F.2d 875, 879 (5th Cir. 1993), *petitions for cert. filed*, (U.S. June 30, 1993; July 2, 1993) (Nos. 93-5048, 93-5097).

Second, Graves' conduct may have violated 18 U.S.C. § 1512(b), a witness tampering statute, which in turn would trigger the upward adjustment. *See* U.S.S.G. § 3C1.1, comment. (n.3(i)). Section 1512(b) prohibits one from using corrupt persuasion toward another with the intent of influencing the testimony of another. *See* 18 U.S.C. § 1512(b), (b)(1). This section may not require coercive conduct on the part of the violator. *See United States v. Masterpol*, 940 F.2d 760, 763 (2d Cir. 1991); *see also Pofahl*, 990 F.2d at 1482 (citing *Masterpol* with approval for the proposition that the mere "urging" of a witness to lie satisfies § 1512(d)). Whether one believes Graves was urging Myron Palermo to lie or not, he was clearly attempting to "influence" the grand jury testimony of Myron Palermo in arguable violation of § 1512(d).

Third, and most importantly, the district court need not have been satisfied that Graves committed either perjury or witness tampering in order to make the adjustment. Although the Guidelines do list "examples of the types of conduct to which [§ 3C1.1] applies", that list is "non-exhaustive". *See* U.S.S.G. § 3C1.1 comment. (n.3). Stated differently, although listed offenses such as subornation of perjury or witness tampering are sufficient to trigger an upward adjustment, they are not necessary; a district court could properly determine that other conduct satisfies § 3C1.1.

Because we are not "left with the definite and firm conviction that a mistake has been committed" by the district court in its finding on the adjustment, we do not find clear error. *See Pofahl*, 990 F.2d at 1480 (citation omitted).

III.

For the foregoing reasons, the conviction and sentence are

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

CRIMINAL ACTION

VERSUS

NO. 91-73-A

ROBERT G. GRAVES

VERDICT

(Filed July 31, 1992)

WE, THE JURY, FIND THE DEFENDANT, ROBERT G. GRAVES,

AS TO COUNT ONE Guilty;

AS TO COUNT TWO Not Guilty.

SO SAY WE ALL.

7-31-1992 – 2:05 p.m. (DATE) /s/ Ms. Emma Lou Connes (FOREMAN)

____ FEE _____

____ PROGRESS _____

X CHARGE _____

____ INDEX _____

____ ORDER _____

____ HEARING _____

DOCUMENT NO. 93

United States District Court

MIDDLE District of LOUISIANA

UNITED STATES OF AMERICA

V.

ROBERT G. GRAVES

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 91-73-A

(Name of Defendant)

Lewis Unglesby, Esq.
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____.

☒ was found guilty on count(s) I after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
:371	Conspiracy to defraud the United States		I

ACTION	INITIALS	DOCKET #
PROCESSED		I
CHARGED	JG	109

The court advised the defendant of his right to appeal both his conviction and sentence.

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984..

☐ The defendant has been found not guilty on count(s) II, and is discharged as to such count(s).

☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.

☐ It is ordered that the defendant shall pay a special assessment of $ 50.00, for count(s) Count I, which shall be due ☒ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 434-44-6551

Defendant's Date of Birth: 7/19/32

Defendant's Mailing Address:

1235 Colonial Dr.
Baton Rouge, La. 70806

Defendant's Residence Address:

NOTICE MAILED TO: DATE 10/15/92 BY

October 14, 1992
Date of Imposition of Sentence

Signature of Judicial Officer

JOHN V. PARKER, CHIEF JUDGE
Name & Title of Judicial Officer

October 14, 1992
Date

FEE
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BEST AVAILABLE COPY

Defendant: Robert G. Graves
Case Number: 91-73-A

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 21 months on Count I.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States marshal.
☐ The defendant shall surrender to the United States marshal for this district,

- ☐ at _____ a.m. / p.m. on _____.
- ☐ as notified by the United States marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

- ☐ before 2 p.m. on _____.
- ☐ as notified by the United States marshal.
- ☒ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant ~~delivered~~ v/s on 9-11-92 (9:00 11-9-92) to FPC PENSACOLA at Pensacola, FL, with a certified copy of this judgment.

John F Fanello, S.P.I.D.L.F
United States Marshal

By _____
Deputy Marshal

BEST AVAILABLE COPY

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years on Count I.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this Court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[X] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[X] The defendant shall not possess a firearm or destructive device.

The defendant shall pay any tax still owed to the Internal Revenue Service.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere

and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine of $25,000.00. The fine includes any costs of incarceration and/or supervision.

[ ] This amount is the total of the fines imposed on individual counts, as follows:

[ ] The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

[ ] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

This fine plus any interest required shall be paid:

[X] in full immediately.

[ ] in full not later than _____.

[ ] in equal monthly installments over a period of _____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

[ ] in installments according to the following schedule of payments:

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

[X] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): Government objection no. 1 is granted. Government objections through 8 are denied. Defendant objections 3, 7 and 8 are granted. Defendant objections 1, 2, 5 and 6 are denied. Paragraphs 1 through 23 of the presentence report are attached.

Guideline Range Determined by the Court:

Total Offense Level: 14

Criminal History Category: I

Imprisonment Range: 15 to 21 months

Supervised Release Range: 2 to 3 years

Fine Range: $4,000.00 to $40,000.00

[ ] Fine is waived or is below the guideline range, because of the defendant's inability to pay Restitution: $_____

[ ] Full restitution is not ordered for the following reason(s):

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

UNITED STATES OF AMERICA	:	CRIM. NO. 89-200007-01
VS.	:	JUDGE VERON
MYRON J. PALERMO	:	

PLEA AGREEMENT

(Filed June 16, 1989)

The following sets forth the complete details of the plea agreement between the United States and the defendant, MYRON J. PALERMO, with respect to an Indictment and a One Count Bill of Information now pending in the United States District Court for the Western District of Louisiana.

IT IS UNDERSTOOD AND AGREED THAT DEFENDANT, MYRON J. PALERMO:

(1) Will enter a plea of guilty to Count I of the Indictment charging him with a conspiracy to possess with intent to distribute approximately TWO THOUSAND (2,000) pounds of marijuana in violation of Title 21, United States Code, Section 841(a)(1), all in violation of Title 21, United States Code, Section 846; and to Count I of a Bill of Information charging him with conspiracy to defraud the United States and the Internal Revenue Service, by impairing and obstructing its lawful function of collection of data and reports of currency transactions in excess of TEN THOUSAND ($10,000.00) DOLLARS in

violation of Title 31, United States Code, Section 5313 and obstructing and impairing the United States Customs Service in their lawful function of the collection of data and reports regarding the transportation of currency and monetary instruments out of the United States and into the United States, in excess of TEN THOUSAND ($10,000.00) DOLLARS in violation of Title 31, United States Code, Section 5316, all in violation of Title 18, United States Code, Section 371.

(2) Will admit to the court that he is in fact guilty of the offenses charged and to which he is pleading.

(3) Will provide full, truthful and complete disclosure to attorneys for the Untied [sic] States and Federal Law Enforcement Agents, to grand juries and at trial as it relates to the subject matter of the referenced Indictment and Bill of Information.

(4) Agrees not to falsely implicate any persons, or make omissions regarding any persons, through his cooperation with the United States and realizes that if he makes any knowing, materially false statement under oath to a grand jury or at the time of the trial, he will be subject to prosecution for perjury.

(5) Agrees that if he is called upon to do so by the United States, the defendant will submit to a polygraph examination, the subject matter of which will be restricted to matters under investigation.

THE UNITED STATES OF AMERICA AGREES:

If the Court finds a factual basis for defendant, MYRON J. PALERMO's, plea of guilty, pursuant to

Federal Rule of Criminal Procedure 11(f) then the United States agrees:

(1) Not to prosecute defendant, MYRON J. PALERMO, for his participation in other violations of Title 21, or violations of Title's 18 and 31 arising out of the investigation on which the charges of the Indictment and Bill of Information are based, between July 13, 1988, and February 6, 1989, except as provided in Counts I of the referenced Indictment and Bill of Information.

(2) At the time of sentencing, the United States agrees to make no recommendation as to appropriate sentence.

(3) At the time of sentencing, the United States will not oppose any recommendation by defendant or his counsel as to what the appropriate sentence should be. The United States, however, reserves the right to correct any factually erroneous information proffered by the defendant or his counsel.

(4) At the time of sentencing, the United States will make known to the Court the nature and extent of the defendant's cooperation, if any.

(5) At the time of sentencing, the United States will move to dismiss Count II of the Referenced Indictment.

GENERAL PROVISIONS:

(1) The defendant, MYRON J. PALERMO, understands that the maximum penalty for a plea of guilty to Count I of the Indictment is a fine of not more than TWO MILLION ($2,000,000.00) DOLLARS, imprisonment for a term of not less than FIVE (5) years to FORTY (40) years and a term of supervised release not to exceed FIVE (5)

years; and on Count I of the Bill of Information a fine of not more than TWO HUNDRED FIFTY THOUSAND ($250,000.00) dollars, (under the alternative fines provisions of Title 18, imprisonment for not more than FIVE (5) years and a term of supervised release of not more than THREE (3) years.

(2) The defendant, MYRON J. PALERMO, understands that since the offense to which he is pleading guilty occurred after November 1, 1987, the Court will impose sentence pursuant to provisions of the Federal Sentencing Commission Guidelines.

(3) It is understood by MYRON J. PALERMO, defendant herein, that defendant's full and truthful cooperation and testimony is a major basis for the agreement with the United States and would have to be received by the United States. If the United States does not receive his full, honest cooperation, this agreement can be rescinded.

(4) Nothing in this agreement shall be construed to protect MYRON J. PALERMO from prosecution for perjury in violation of Title 18, United States Code, Sections 1621 through 1623, false declarations or false statements in violation of Title 18, United States Code, Section 1001, or obstruction of justice in violation of Title 18, United States Code, Section 1501 through 1511, should he commit any of the offenses during the discharge of his obligation pursuant to the provisions of this plea agreement.

(5) The defendant, MYRON J. PALERMO, understands that if the Court accepts defendant's plea of a guilt to a felony conviction, then, under the provisions of Title 18, United States Code, Section 3013, at the time of sentencing, the Court is required to assess the defendant, on

each Count, a fee of $50.00. The defendant understands that this fee is required of all defendants for violations committed after November 11, 1984, and is for the purpose of providing a source of revenue for the United States Victim Compensation Assistance Program.

(6) The defendant, MYRON J. PALERMO, understands that the Court can order restitution of the monies retained by him, as his fees, for the currency transactions which took place during the time period July 13, 1988, and February 6, 1989.

(7) It is understood among the defendant, defense counsel, and the United States that any recommendation made by the United States pursuant to this plea agreement shall not be binding upon the Court and that the ultimate disposition in this case will remain within the sound discretion of the Court, in accordance with Federal Rule of Criminal Procedure 11(e)(1)(B).

(8) This is the entire plea agreement between the defendant, MYRON J. PALERMO, and the United States and is entered into freely, voluntarily, and upon advice of counsel.

SIGNED this 16th day of June, 1989, at Lake Charles, Louisiana.

/s/ Myron J. Palermo
MYRON J. PALERMO
Defendant

/s/ Gary Hill
GARY HILL
Attorney for Defendant

RALEIGH NEWMAN
Attorney for Defendant

JOSEPH S. CAGE, JR.
United States Attorney

By: /s/ Larry J. Regan
LARRY J. REGAN
Assistant United States
Attorney
Room 305 Federal Building
705 Jefferson Street
Lafayette, LA 70501

ATTEST: A TRUE COPY
DATE 12-12 1991
ROBERT H. SHEMWELL, CLERK

By Debere Cook
Deputy Clerk, U.S. District Court
Western District of Louisiana

APPENDIX E

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

VERSUS

ROBERT G. GRAVES

CRIMINAL NO. 91-73-A-M2

UNITED STATES' MOTION IN LIMINE

(Filed June 26, 1992)

NOW INTO COURT COMES the United States of America by P. Raymond Lamonica, United States Attorney for the Middle District of Louisiana, through Richard B. Launey and Rene' Salomon, Assistant United States Attorneys, who respectfully represent as follows:

1.

The United States has provided to the defendant, in discovery, a copy of a plea agreement from the Western District of Louisiana in the case of *United States v. Myron Palermo*, Criminal No. 89-200007-01.

2.

The plea agreement contains a single paragraph which states that Myron Palermo, "Agrees that if he is called upon to do so by the United States, the defendant will submit to a polygraph examination, the subject matter of which will be restricted to matters under investigation." No polygraph examination of Myron Palermo was

ever requested or conducted. The United States has prepared a copy of the plea agreement for use at trial with that paragraph removed.

3.

Rule 611 of the Federal Rules of Evidence requires that the Court exercise control over the interrogation of witnesses and the presentation of evidence so as to facilitate the ascertainment of the truth. Included within the mandate of Rule 611 is the obligation to ensure that questions asked of a witness, arguments of counsel and the presentation of evidence do not present information that is inadmissible.

4.

The long standing rule of the Fifth Circuit Court of Appeals and this Court is that references to polygraph examinations by witnesses is improper and inadmissible.

5.

Federal Rules of Evidence, Rule 104(c), authorizes the Court to make preliminary evidentiary determinations prior to trial.

6.

The United States seeks an order prohibiting the defendant from making any reference to polygraphs in the trial of this case. If the defendant, even inadvertently made such a reference the likelihood of unfair prejudice

to both parties is high causing the possibility of mistrial and creating issues for review.

WHEREFORE, the United States requests that the Court enter an order prohibiting the defendant from arguing, questioning or otherwise presenting evidence related to polygraph examinations of any witness to the jury.

UNITED STATES OF AMERICA

P. RAYMOND LAMONICA
UNITED STATES ATTORNEY

/s/ Richard B. Launey
RICHARD B. LAUNEY
ASSISTANT UNITED
STATES ATTORNEY

/s/ Rene' Salomon
RENE' SALOMON
ASSISTANT UNITED
STATES ATTORNEY
339 Florida Street, 6th Floor
Baton Rouge, LA 70801
Telephone: (504) 389-0443

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	)	
VERSUS	)	CRIMINAL NO.
	)	91-73-A-M2
ROBERT G. GRAVES	)	

MEMORANDUM IN SUPPORT OF
UNITED STATES' MOTION IN LIMINE

(Filed June 26, 1992)

MAY IT PLEASE THE COURT:

The United States, unlike the defendant, has little recourse if improper and inadmissible evidence is placed before the jury. Impermissible reference to polygraphs can occur at any stage of the trial, including the opening statement, argument of counsel, and cross-examination.

Rule 611 of the Federal Rules of Evidence require the Court to exercise its discretion to protect the integrity of the fact finding process. A basic protection, to insure the integrity of the fact finding process, is the requirement that litigants do not introduce clearly inadmissible evidence. The Louisiana Rules of Professional Conduct, Rule 3.4 states in part, "A lawyer shall not: (e) in trial allude, to any matter that the lawyer does not reasonably believe is . . . supported by admissible evidence . . . "

Rule 103(c) pertinently provides that "proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means." Rule 104(c) essentially provides that hearings on preliminary matters shall be conducted

outside the hearing of the jury when the interests of justice require it. *See, United States v. Kopituk*, 690 F.2d 1289, 1336-37 (11th Cir. 1982); *United States v. Marzano*, 537 F.2d 257, 265 (7th Cir. 1976).

The Courts of this circuit has long and consistently held that evidence relating to polygraph examinations is inadmissible. *United States v. Masri*, 547 F.2d 932, 936 (5th Cir.), *cert denied*, 434 U.S. 907, 98 S.Ct. 309, 54 L.Ed.2d 195 (1977); *United States v. Cochran*, 499 F.2d 380, 393 (5th Cir. 1974), *cert. denied*, 419 U.S. 1124, 95 S.Ct. 810, 42 L.Ed.2d 825 (1975); *United States v. Gloria*, 494 F.2d 477, 483 (5th Cir.), *cert. denied*, 419 U.S. 995, 95 S.Ct. 306, 42 L.Ed.2d 267 (1974); *United States v. Frogge*, 476 F.2d 969, 970 (5th Cir.) *cert. denied*, 414 U.S. 849 94 S.Ct. 138, 38 L.Ed.2d 97 (1973). Reference to a witnesses willingness to undergo a polygraph examination during cross-examination has been found to be improper. *United States v. Martino*, 648 F.2d 367, 390 (5th Cir. 1981). Reference to the plea agreement provision referring to polygraphs could create difficulties at trial and become an issue on review.

To avoid these problems and to protect the integrity of the trial, the United States requests that the Court enter an order directing the defendant refrain from arguing, questioning or otherwise presenting evidence concerning polygraphs to the jury.

Respectfully submitted,

P. RAYMOND LAMONICA
UNITED STATES ATTORNEY

/s/ Richard B. Launey
RICHARD B. LAUNEY
ASSISTANT UNITED
STATES ATTORNEY

/s/ Rene' Salomon
RENE' SALOMON
ASSISTANT UNITED
STATES ATTORNEY
339 Florida Street, 6th Floor
Baton Rouge, LA 70801
Telephone: (504) 389-0443

CERTIFICATE OF SERVICE

I hereby certify that a copy of UNITED STATES' MOTION IN LIMINE, ORDER, and MEMORANDUM IN SUPPORT OF MOTION IN LIMINE has been mailed postage prepaid to:

Lewis Unglesby
Unglesby Law Offices
246 Napoleon Street
Baton Rouge, LA 70802
Baton Rouge, Louisiana this 26 day of June, 1992.

/s/ Richard B. Launey
RICHARD B. LAUNEY
ASSISTANT U.S. ATTORNEY

APPENDIX F

UNITED STATES OF AMERICA	CRIMINAL
VERSUS	ACTION
ROBERT G. GRAVES	No. 91-73-A

OPPOSITION TO GOVERNMENT'S MOTION IN LIMINE REGARDING THE MYRON PALERMO PLEA AGREEMENT

(Filed July 8, 1992)

The fact of a plea agreement and the resulting need for same is critical to the jury's evaluation of a witness's candor, truthfulness and reason to testify. These plea agreements were written by United States prosecutors. More importantly, they were entered into with the full agreement of the then defendant, now witness, and were blessed by the Court who accepted the plea and sentenced the defendant in accordance with the terms of the plea. They were public Court records created by the prosecuting authority of the Justice Department and the defendant/witness, with advice of counsel. To now ask that any portion of those agreements be removed, altered, ignored, or censored, is contrary to the established standards of cross-examination and confrontation. Mr. Palermo and the prosecuting authorities entered into language acceptable to each of them. Mr. Palermo benefitted as a result of that contract, and testifies here as part of that bargain. Neither he nor the prosecuting attorney of the Middle District should be able to alter, in any fashion, that agreement. What relevance, if any, the jury chooses to give to various portions of the agreement is for them. The defendant, Graves, should not be prejudiced by an

after-the-fact alteration of the entire scope of depth of Palermo's bargain with the authorities. There is no authority in the cases cited by the Government or the Court to amend, censor or strike portions of a plea agreement. It is not Mr. Graves' fault that language regarding a polygraph was included, nor is it his fault that no polygraph was given, nor does he have any rights to demand now that such a polygraph be given. Furthermore, Graves has no right to admit polygraphs he has passed, nor any right to admit any polygraph failures by Palermo. However, that is not the same thing at all in terms of censoring or altering a plea agreement Palermo entered into, written by the United States when it was attempting prosecution in return for cooperation.

Furthermore, in the use of the plea agreement for whatever purpose Mr. Graves' [sic] will be following the Government. It is the United States that will use the plea agreement in its direct examination and probably in opening to advise the jury of the nature of its witness. That will be a strategic trial decision, but no doubt the plea agreement will be introduced by one side or the other. When witnesses have testified about polygraph examinations the courts have found the error to be harmless, *U.S. V. Martino*, 648 F.2d 367, 390 (1981). Certainly in this situation where the government entered into the plea agreement, the Court should not be placed in the position of having to alter those portions that the prosecutor now feels weaken his case.

BY ATTORNEYS:

/s/ Lewis O. Unglesby
LEWIS O. UNGLESBY
246 NAPOLEON STREET

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing have been served upon counsel for all parties in these proceedings by mailing such to each by First Class U.S. Mail, properly addressed and postage prepaid, on the ___ day of ___, 19__.

/s/ Lewis O. Unglesby
LEWIS O. UNGLESBY

APPENDIX G

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	:	
versus	:	CRIMINAL
ROBERT G. GRAVES	:	NO. 91-73-A-M2

JOINT STIPULATION OF THE UNITED STATES OF AMERICA AND ROBERT G. GRAVES PURSUANT TO FEDERAL RULES OF APPELLATE PROCEDURE, RULE 10(e)

The United States and the defendant, Robert G. Graves, agree and stipulate that the following information accurately sets forth the events which took place during the referenced proceeding:

At status conferences prior to trial, conducted by Chief Judge John V. Parker, and attended by counsel for the United States of America and counsel for the defendant, Robert G. Graves, the *United States' Motion in Limine* was considered. The Court said that if the defendant insisted on the inclusion of the paragraph pertaining to the polygraph examination in the plea agreement presented to the jury, then the jury would be given a cautionary instruction. The Court said that it was clear error for the United States to offer any proof at trial regarding whether or not Myron Palermo was asked to take a polygraph examination pursuant to his plea agreement; and that neither party could ask questions regarding whether Myron Palermo actually took a polygraph test.

Counsel for the defendant did not agree with the Court. He said he wanted to ask questions of Myron Palermo regarding the plea agreement and polygraph, including if he had been asked by the United States to take a polygraph. The Court denied the defendant's request and authorized the United States to use a redacted plea agreement which did not include the paragraph mentioning the possibility of a polygraph examination.

UNITED STATES OF AMERICA, by

P. Raymond Lamonica
United States Attorney

Richard B. Launey
Assistant U.S. Attorney

/s/ L. Unglesby
Lewis O. Unglesby
Attorney for Defendant
Robert G. Graves

René I. Salomon
Assistant U.S. Attorney

DATE: _____

APPENDIX H

* * *

[p. 207] A ROUTE 7, BOX 78, LAKE CHARLES, LOUISIANA.

Q ARE YOU MARRIED?

A YES, SIR.

Q DO YOU HAVE CHILDREN?

A THREE.

Q WHAT DO YOU DO FOR A LIVING, MR. PALERMO?

A I'M IN THE OIL AND GAS EXPLORATION BUSINESS.

Q WHAT IS YOUR EDUCATIONAL BACKGROUND?

A I HAVE HAD APPROXIMATELY THREE-AND-A-HALF TO FOUR YEARS OF COLLEGE. I DIDN'T GRADUATE.

Q WOULD YOU TAKE A LOOK IN THAT BROWN FOLDER NEXT TO YOU AND TAKE OUT A DOCUMENT ENTITLED "PLEA AGREEMENT." YOU CAN GO AHEAD AND TAKE IT OUT OF THE PLASTIC, PLEASE.

(WITNESS COMPLIES.)

Q IF YOU WOULD, CAREFULLY LOOK THROUGH THAT DOCUMENT AND SEE IF YOU RECOGNIZE IT.

(WITNESS COMPLIES.)

Q IS YOUR SIGNATURE ON THE LAST PAGE?

A YES, SIR, IT IS.

Q DO YOU RECOGNIZE THAT DOCUMENT?

A YES, SIR.

Q WHAT IS IT?

A IT'S A PLEA AGREEMENT THAT I PLEADED GUILTY TO THE CRIME I COMMITTED AGAINST THE FEDERAL GOVERNMENT.

[p. 209] [sic] Q IT'S YOUR PLEA AGREEMENT, SIR?

A YES, SIR.

MR. LAUNEY: AT THIS TIME, THE UNITED STATES MOVES TO INTRODUCE UNITED STATES EXHIBIT NUMBER 12, THE PLEA AGREEMENT.

THE COURT: ALL RIGHT.

MR. LAUNEY: WE WOULD, ALSO, AT THIS TIME, YOUR HONOR, ASK TO HAND OUT COPIES OF THE PLEA AGREEMENT TO EACH ONE OF THE JURORS.

THE COURT: YOU HAVE COPIES?

MR. LAUNEY: FOR EACH OF THE JURORS, YES, SIR.

THE COURT: MARK THAT DOWN, COUNSEL. DON'T ASK TO PASS ANYTHING MORE UNLESS YOU HAVE ENOUGH COPIES FOR EACH MEMBER OF THE JURY.

MR. LAUNEY: YES, SIR.

(JURY RECEIVES DOCUMENT.)

MR. LAUNEY: MR. UNGLESBY, DO YOU HAVE YOUR COPY WITH YOU?

MR. UNGLESBY: OF THE PLEA AGREEMENT IN THE WESTERN DISTRICT?

MR. LAUNEY: YES.

MR. UNGLESBY: YES, SIR.

BY MR. LAUNEY:

Q MR. PALERMO, WHICH U.S. ATTORNEY'S OFFICE DO YOU [p. 210] HAVE THIS PLEA AGREEMENT WITH?

A WITH MR. LARRY REGAN OUT OF LAKE CHARLES, LOUISIANA, SIR.

Q IS THAT THE U.S. ATTORNEY'S OFFICE HERE IN BATON ROUGE?

A NO, SIR.

Q AT THIS TIME, WOULD YOU CHECK AND SEE IF I'M READING THIS CORRECTLY. I'LL READ THE FIRST PARAGRAPH.

"THE FOLLOWING SETS FORTH THE COMPLETE DETAILS OF THE PLEA AGREEMENT BETWEEN THE UNITED STATES AND THE DEFENDANT, MYRON J. PALERMO, WITH RESPECT TO AN INDICTMENT AND A ONE COUNT BILL OF INFORMATION NOW PENDING IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA.

"IT IS UNDERSTOOD AND AGREED THAT THE DEFENDANT, MYRON J. PALERMO, WILL ENTER A PLEA OF GUILTY TO COUNT ONE OF THE INDICTMENT CHARGING HIM WITH A CONSPIRACY TO POSSESS WITH INTENT TO DISTRIBUTE APPROXIMATELY 2,000 POUNDS OF MARIJUANA IN VIOLATION OF TITLE 21, *UNITED STATES CODE*, SECTION 841(A)(1), ALL IN VIOLATION OF TITLE 21, *UNITED STATES CODE*, SECTION 846, AND TO COUNT ONE OF A BILL OF INFORMATION CHARGING HIM WITH A CONSPIRACY TO DEFRAUD THE UNITED STATES AND THE INTERNAL REVENUE SERVICE BY IMPAIRING AND OBSTRUCTING ITS LAWFUL FUNCTIONS OF COLLECTION OF DATA AND REPORTS [p. 211] OF CURRENCY TRANSACTIONS IN EXCESS OF $10,000 IN VIOLATION OF TITLE 31, *UNITED STATES CODE*, SECTION 5313 AND OBSTRUCTING AND IMPAIRING THE UNITED STATES CUSTOMS SERVICE IN THEIR LAWFUL FUNCTION OF THE COLLECTION OF DATA AND REPORTS REGARDING THE TRANSPORTATION OF CURRENCY AND MONETARY INSTRUMENTS OUT OF THE UNITED STATES AND INTO THE UNITED STATES IN EXCESS OF $10,000, IN VIOLATION OF TITLE 31, *UNITED STATES CODE*, SECTION 5316, ALL IN VIOLATION OF TITLE 18, *UNITED STATES CODE*, SECTION 371.

"TWO, THE DEFENDANT WILL ADMIT TO THE COURT THAT HE IS, IN FACT, GUILTY OF THE OFFENSES CHARGED AND TO WHICH HE IS PLEADING."

DID I READ THOSE CORRECTLY, SIR?

A YES, SIR.

Q THE REFERENCE I ADDED IN WAS FROM THE FIRST PAGE, "IT IS UNDERSTOOD AND AGREED THAT THE DEFENDANT, MYRON J. PALERMO . . . " THAT WAS BEFORE THE TWO; IS THAT CORRECT, SIR?

A YES, SIR.

Q DID YOU PLEAD GUILTY TO ANYTHING?

A I PLED GUILTY TO THESE CHARGES, SIR.

Q WHAT, BRIEFLY, IN YOUR OWN WORDS, DID YOU PLEAD GUILTY TO?

A I PLED GUILTY TO POSSESSION WITH THE INTENT TO [p. 212] POSSESS 2,000 POUNDS OF MARIJUANA AND, ALSO, MONEY LAUNDERING.

Q IF YOU WOULD, SIR, SPEAK UP AND SPEAK CLEARLY.

A YES, SIR. I PLED TO THESE CHARGES OF CONSPIRACY TO POSSESS MARIJUANA AND MONEY LAUNDERING, SIR.

Q FOLLOW WITH ME ON PARAGRAPHS THREE AND FOUR.

"WILL PROVIDE TRUTHFUL, COMPLETE DISCLOSURE TO ATTORNEYS FOR THE UNITED STATES AND FEDERAL LAW ENFORCEMENT AGENTS TO GRAND JURIES AND AT TRIALS AS IT RELATES TO THE SUBJECT MATTER OF THE REFERENCED INDICTMENT AND BILL OF INFORMATION.

"AGREES NOT TO FALSELY IMPLICATE ANY PERSONS OR TO MAKE OMISSIONS REGARDING ANY PERSONS THROUGH HIS COOPERATION WITH THE UNITED STATES, AND REALIZES THAT IF HE MAKES ANY KNOWING MATERIALLY FALSE STATEMENT, UNDER OATH, TO A GRAND JURY OR AT THE TIME OF THE TRIAL, HE WILL BE SUBJECT TO PROSECUTION FOR PERJURY."

DID I READ THOSE PARAGRAPHS CORRECTLY, SIR?

A YES, SIR, YOU DID.

Q WHAT DO THOSE PARAGRAPHS REQUIRE YOU TO DO?

A TO TELL THE TRUTH.

Q I WILL NOW READ THE SECTION ENTITLED, "UNITED STATES OF AMERICA AGREES . . . "

"IF THE COURT FINDS A FACTUAL BASIS FOR DEFENDANT MYRON J. PALERMO'S PLEA OF GUILTY PURSUANT TO THE [p. 213] FEDERAL RULES OF CRIMINAL PROCEDURE 11F, THEN THE UNITED STATES AGREES, ONE, NOT TO PROSECUTE DEFENDANT, MYRON J. PALERMO, FOR PARTICIPATION IN ANY OTHER VIOLATIONS OF TITLE 21 OR VIOLATIONS OF TITLES 18 AND 31 ARISING OUT OF THE INVESTIGATION ON WHICH THE CHARGES OF THE INDICTMENT AND BILL OF INFORMATION ARE BASED BETWEEN JULY 13, 1988, AND FEBRUARY 6, 1989, EXCEPT AS PROVIDED IN COUNT ONE OF THE REFERENCED INDICTMENT AND BILL OF INFORMATION."

DID I READ THAT PARAGRAPH CORRECTLY, SIR?

A YES, SIR.

Q DO THESE OTHER VIOLATIONS REFERRED TO IN THESE PARAGRAPHS, PREVIOUS TO THIS POINT IN THE PLEA AGREEMENT, REFER IN ANY WAY TO THIS CASE?

A NO, SIR, THEY DON'T.

Q FOLLOW WITH ME THROUGH THREE, FOUR, AND FIVE OF THIS PAGE.

"AT THE TIME OF SENTENCING THE UNITED STATES AGREES TO MAKE NO RECOMMENDATION AS TO APPROPRIATE SENTENCE. AT THE TIME OF SENTENCING, THE UNITED STATES WILL NOT OPPOSE ANY RECOMMENDATION BY DEFENDANT OR HIS COUNSEL AS TO WHAT THE APPROPRIATE SENTENCE SHOULD BE. THE UNITED STATES, HOWEVER, RESERVES THE RIGHT TO CORRECT ANY FACTUALLY ERRONEOUS INFORMATION PROFFERED BY THE DEFENDANT OR HIS COUNSEL.

[p. 214] "AT THE TIME OF SENTENCING THE UNITED STATES WILL MAKE KNOWN TO THE COURT THE NATURE AND EXTENT OF DEFENDANT'S COOPERATION, IF ANY. AT THE TIME OF SENTENCING, THE UNITED STATES WILL MOVE TO DISMISS COUNT TWO OF THE REFERENCED INDICTMENT."

SIR, WHAT IS YOUR UNDERSTANDING THE UNITED STATES WOULD DO IN CONNECTION WITH YOUR SENTENCING UNDER THIS PLEA AGREEMENT?

A UNDER THIS PLEA AGREEMENT, AS LONG AS I TOLD THE TRUTH AND COOPERATED WITH THE

GOVERNMENT, THAT THE UNITED STATES PROSECUTOR WILL MAKE KNOWN TO THE COURT ANY EXTENT THAT I COOPERATED WITH THEM, SIR.

Q NOW, DO THOSE PARAGRAPHS REFERRING TO SENTENCING HAVE ANYTHING TO DO WITH THIS CASE?

A NO, SIR, THEY DON'T.

Q TURNING NOW TO GENERAL PROVISIONS, PARAGRAPH ONE.

"THE DEFENDANT, MYRON J. PALERMO, UNDERSTANDS THAT THE MAXIMUM PENALTY FOR A PLEA OF GUILTY TO COUNT ONE OF THE INDICTMENT IS A FINE OF NOT MORE THAN $2 MILLION, IMPRISONMENT FOR A TERM OF NOT LESS THAN FIVE YEARS TO FORTY YEARS, AND A TERM OF SUPERVISED RELEASE NOT TO EXCEED FIVE YEARS.

"AND ON COUNT ONE OF THE BILL OF INFORMATION, A FINE OF NOT MORE THAN $250,000. UNDER THE ALTERNATE FINES PROVISION OF TITLE 18, IMPRISONMENT FOR NOT MORE [p. 215] THAN FIVE YEARS, AND A TERM OF SUPERVISED RELEASE OF NOT MORE THAN THREE YEARS.

TWO, THE DEFENDANT UNDERSTANDS THAT SINCE THE OFFENSE TO WHICH HE IS PLEADING GUILTY OCCURRED AFTER NOVEMBER 1, 1987, THE COURT WILL IMPOSE SENTENCE PURSUANT TO THE PROVISIONS OF THE FEDERAL SENTENCING GUIDELINES.

WERE YOU, IN FACT, SENTENCED, SIR?

A YES, SIR, I WAS.

Q WHO DECIDED WHAT YOUR SENTENCE WOULD BE?

A THE FEDERAL JUDGE THAT SENTENCED ME, JUDGE EARL VERON, FROM LAKE CHARLES, LOUISIANA, WHO IS NOW DECEASED.

Q I'M SORRY, I CAN'T HEAR YOU.

A I SAID JUDGE EARL VERON FROM LAKE CHARLES, LOUISIANA, SENTENCED ME, SIR.

Q WHAT COULD YOU HAVE RECEIVED, AS A SENTENCE TO IMPRISONMENT, UNDER THIS PLEA AGREEMENT? WHAT IS THE MAXIMUM?

A I'LL HAVE TO READ IT HERE. NOT LESS THAN FIVE YEARS, TO FORTY YEARS, AND FIVE YEARS – FIVE TO FORTY YEARS.

Q I'M SORRY, SIR?

A I SAID FIVE TO FORTY YEARS, SIR, THE WAY I UNDERSTAND IT HERE IN THE PLEA AGREEMENT.

[p. 216] Q ALL RIGHT. HOW MUCH OF A FINE COULD YOU HAVE RECEIVED?

A TWO MILLION ON ONE COUNT AND $250,000 ON THE OTHER COUNT, SIR.

Q WHAT IS THE SENTENCE TO IMPRISONMENT THAT YOU RECEIVED UNDER THIS BILL OF INFORMATION AND INDICTMENT?

A I RECEIVED THIRTY MONTHS IN FEDERAL PRISON, SIR.

Q HOW LARGE A FINE WAS IMPOSED?

A I WAS NOT IMPOSED A FINE, SIR, AT ALL.

Q PARAGRAPH THREE READS, "IT IS UNDERSTOOD BY MYRON J. PALERMO, DEFENDANT HEREIN, THAT DEFENDANT'S FULL AND TRUTHFUL COOPERATION AND TESTIMONY IS A MAJOR BASIS FOR THE AGREEMENT WITH THE UNITED STATES AND WOULD HAVE TO BE RECEIVED BY THE UNITED STATES. IF THE UNITED STATES DOES NOT RECEIVE HIS FULL, HONEST COOPERATION, THIS AGREEMENT CAN BE RESCINDED."

NOW, WHO DID YOU UNDERSTAND COULD RESCIND YOUR PLEA AGREEMENT?

A THE FEDERAL ATTORNEY COULD RESCIND MY PLEA AGREEMENT, OR ANY FEDERAL AGENT THAT I MIGHT LIE TO, SIR.

Q COULD THY DO IT ON THEIR OWN OR DO THEY HAVE TO GET PERMISSION FROM ANYONE ELSE TO VOID THIS DOCUMENT?

A SIR, I DON'T KNOW THAT QUESTION TO YOUR ANSWER (SIC).

[p. 217] Q SO, YOU DON'T UNDERSTAND THAT?

A NO, SIR, I DON'T UNDERSTAND THAT. I'M NOT A LAWYER, SIR.

Q WHAT IS YOUR UNDERSTANDING OF WHAT COULD CAUSE THIS PLEA AGREEMENT TO BE RESCINDED?

A IF I WOULD LIE ABOUT ANYTHING, IT COULD BE RESCINDED.

Q WHAT COULD HAPPEN TO YOU IF THIS PLEA AGREEMENT WAS CANCELED OR RESCINDED?

A THAT I WOULD HAVE TO GO BACK TO PRISON AND SERVE THE REMAINDER OF MY SUPERVISED RELEASE, OR MORE. I DON'T KNOW, SIR, BUT THAT'S WHAT I UNDERSTAND.

Q HOW ABOUT OTHER CHARGES; COULD THEY BE BROUGHT AGAINST YOU?

A THE OTHER CHARGES THAT WERE IN HERE COULD BE BROUGHT AGAINST ME, YES, SIR.

Q HOW ABOUT ANY INFORMATION YOU PROVIDED; COULD THAT BE USED AGAINST YOU?

A YES, SIR.

Q WHETHER IT WAS THE TRUTH, OR NOT, CORRECT?

A YES, SIR.

Q PARAGRAPH FOUR, "NOTHING IN THIS AGREEMENT SHALL BE CONSTRUED TO PROTECT MYRON J. PALERMO FROM PROSECUTION FOR PERJURY AND VIOLATION OF TITLE 18, *UNITED STATES CODE*, SECTION [sic] 1621 THROUGH 1623, FALSE [p. 218] DECLARATIONS OR FALSE STATEMENTS IN VIOLATION OF TITLE 18, *UNITED STATES CODE*, SECTION 1001, OR OBSTRUCTION OF JUSTICE AND VIOLATION OF TITLE 18, *UNITED STATES CODE*, SECTION [sic] 1501 THROUGH 1511, SHOULD HE COMMIT ANY OF

THE OFFENSES DURING THE DISCHARGE OF HIS OBLIGATION PURSUANT TO THE PROVISIONS OF THIS PLEA AGREEMENT."

DOES THIS WESTERN DISTRICT AGREEMENT PROTECT YOU, SIR, IF YOU LIE?

A NO, SIR.

Q FOLLOW WITH ME ON PARAGRAPHS FIVE AND SIX. "THE DEFENDANT, MYRON J. PALERMO, UNDERSTANDS THAT IF THE COURT ACCEPTS THE DEFENDANT'S PLEA OF GUILTY TO A FELONY CONVICTION, THEN UNDER THE PROVISIONS OF TITLE 18, *UNITED STATES CODE*, SECTION 3013 AT THE TIME OF SENTENCING, THE COURT IS REQUIRED TO ACCESS THE DEFENDANT, ON EACH COUNT, A FEE OF FIFTY DOLLARS.

"THE DEFENDANT UNDERSTANDS THAT THIS FEE IS REQUIRED OF ALL DEFENDANTS FOR VIOLATIONS COMMITTED AFTER NOVEMBER 11, 1984, AND IS FOR THE PURPOSE OF PROVIDING A SOURCE OF REVENUE FOR THE UNITED STATES VICTIMS COMPENSATION ASSISTANCE PROGRAM.

"THE DEFENDANT, MYRON J. PALERMO, UNDERSTANDS THAT THE COURT CAN ORDER RESTITUTION OF THE MONIES RETAINED BY HIM AS HIS FEES FOR THE CURRENCY TRANSACTION, WHICH TOOK PLACE DURING THE TIME PERIOD JULY 13, 1988, AND [p. 219] FEBRUARY 6, 1989."

DID I READ THAT CORRECTLY, SIR?

A YES, SIR, YOU DID.

Q DID THE JUDGE ORDER YOU TO PAY ANY RESTITUTION, SIR?

A THE ONLY THING I PAID WAS FIFTY DOLLARS ON EACH COUNT THAT I WAS CHARGED WITH, SIR.

Q DID THE JUDGE ORDER YOU TO PAY ANY RESTITUTION?

A NO, SIR.

Q PARAGRAPH SEVEN READS, "IT IS UNDERSTOOD AMONG THE DEFENDANT, DEFENSE COUNSEL, AND THE UNITED STATES THAT ANY RECOMMENDATION MADE BY THE UNITED STATES PURSUANT TO THIS PLEA AGREEMENT SHALL NOT BE BINDING UPON THE COURT, AND THAT THE ULTIMATE DISPOSITION IN THIS CASE WILL REMAIN WITHIN THE SOUND DISCRETION OF THE COURT, IN ACCORDANCE WITH FEDERAL RULES OF CRIMINAL PROCEDURE 11(E)(1)(B)."

DID I READ THAT CORRECTLY, SIR?

A YES, SIR.

Q WHO DETERMINED THE SENTENCE THAT YOU WOULD RECEIVED [sic]?

A JUDGE EARL VERON SENTENCED ME, SIR.

Q COULD THE UNITED STATES ATTORNEY'S OFFICE IN LAKE CHARLES OR BATON ROUGE DECIDE WHAT SENTENCE YOU WERE GOING TO RECEIVE?

[p. 220] A NO, SIR.

Q TAKE A LOOK AT PARAGRAPH EIGHT, SIR. THIS IS THE ENTIRE PLEA AGREEMENT BETWEEN THE DEFENDANT, MYRON J. PALERMO, AND THE UNITED STATES, AND IS ENTERED INTO FREELY, VOLUNTARILY, AND UPON ADVICE OF COUNSEL, SIGNED THIS 16TH DAY OF JUNE, 1989, AT LAKE CHARLES, LOUISIANA, AND YOU HAVE IDENTIFIED YOUR SIGNATURE; IS THAT CORRECT, SIR?

A YES, SIR, THAT IS CORRECT.

Q DO YOU HAVE ANY OTHER AGREEMENTS WITH THE WESTERN DISTRICT OF THE UNITED STATES?

A THIS IS THE ONLY AGREEMENT I HAVE WITH THE WESTERN DISTRICT OF THE UNITED STATES, SIR.

Q WAS YOUR SENTENCE EVER CHANGED, SIR?

A YES, SIR.

Q WHO CHANGED YOUR SENTENCE?

A WHO CHANGED MY SENTENCE? JUDGE WALTERS OUT OF, I THINK, ALEXANDRIA OR MONROE, LOUISIANA, SIR.

Q HOW DID HE CHANGE YOUR SENTENCE?

A I WAS BROUGHT INTO COURT ON A RULE 35, AND HE CHANGED MY – REDUCED MY SENTENCE BY A YEAR, SIR.

Q WHAT IS A RULE 35, SIR?

A IT'S FOR SUBSTANTIAL ASSISTANCE TO THE FEDERAL GOVERNMENT, SIR.

Q IS THIS SOMETHING YOU REQUESTED, SIR?

* * *

APPENDIX I

* * *

PALERMO/LAUNEY

[p. 185] A YES, SIR.

Q WHAT, IF ANYTHING, DID YOU SAY TO MYRON PALERMO ABOUT WHAT HE WAS TO DO IF ASKED ABOUT THE FALSE LAND DEAL BY FEDERAL AGENTS?

A I TOLD HIM NOT TO SAY ANYTHING.

Q NOW, TURN YOUR ATTENTION AFTER THIS TIME PERIOD, TO MAY 1989. DID YOU SPEAK TO THE DEFENDANT CONCERNING A FEDERAL INVESTIGATION INVOLVING THIS LAND DEAL? DID THAT OCCUR?

A YES, SIR.

Q DID HE GIVE YOU ANY INFORMATION ABOUT WHAT HIS C.P.A. HAD DONE?

A HE SAID HIS C.P.A. HAD TESTIFIED BEFORE A GRAND JURY.

Q AS YOU SIT HERE TODAY, CAN YOU RECALL WHAT MR. GRAVES TOLD YOU EXACTLY? CAN YOU RECALL EXACTLY WHAT HE TOLD YOU?

A NO, SIR, I CAN'T RECALL EXACTLY. IT WAS SOMETHING TO THE SENSE THAT HIS C.P.A. HAD SAID THIS, AND TO TELL MY BROTHER THAT HIS C.P.A. HAD SAID THAT.

Q WHAT WAS THE PURPOSE THAT MR. GRAVES WANTED YOU TO SAY TO YOUR BROTHER WHAT THE C.P.A. HAD SAID TO THE GRAND JURY?

MR. UNGLESBY: EXCUSE ME. IF HE KNOWS WHAT BOB SAYS, THAT'S FINE. IF HE'S JUST SPECULATING, I [p. 186] DON'T THINK HE SHOULD BE ABLE TO ANSWER THAT QUESTION.

BY MR. LAUNEY:

Q DO YOU KNOW, FROM YOUR CONVERSATION WITH MR. GRAVES, THE DEFENDANT, DO YOU KNOW WHY HE WANTED YOU TO PASS THIS INFORMATION ON TO YOUR BROTHER?

A SO MY BROTHER WOULD SAY THE SAME THING THE C.P.A. SAID.

Q TURNING YOUR ATTENTION, SIR, TO 1985 AND 1986, DID YOU HAVE A CONVENIENCE STORE BUSINESS IN SULPHUR, LOUISIANA?

A YES, SIR.

Q WHAT WAS THE NAME OF THE CONVENIENCE STORE?

A SAVE-TIME.

Q WAS ANYONE ELSE IN THE BUSINESS WITH YOU?

A MY BROTHER, ANTHONY, AND TERRY WALL.

Q IN 1985 AND 1986, WHERE WAS THE SAVE-TIME STORE IN SULPHUR LOCATED?

A CORNER OF INTERSTATE 10 AND ARIZONA STREET.

Q SINCE THAT TIME, HAS THE PHYSICAL LOCATION OF THIS STORE MOVED?

A MOVED TO THE NEXT PIECE OF PROPERTY OVER.

Q WHAT CAUSED IT TO MOVE?

A THE STATE EXPROPRIATED THE CORNER PIECE OF PROPERTY SO THEY COULD MOVE THE ROAD OVER TO BUILD THE INTERCHANGE.

* * *

APPENDIX J

* * *

[p. 8] dollars. So I performed that recalculation of the information appearing on pages eight and nine of the pre-sentence report already. Now, that brings us down to some of these specific objections that have been taken. The Government's objection number one clearly is a typographical error, and that objection is granted. Objection number two of the Government is denied. I have just thrown that out. Objection number three of the Government simply presents some additional reasons that might be relied upon for obstruction of justice. The Court concurs with the information in the pre-sentence report to the effect that one of the Palermo brothers did testify that Mr. Graves told him that my C.P.A. has testified before the Grand Jury, and you tell your brother to say the same thing when he is called as a witness. That is a sufficient justification. So as far as the additional justification, it is not required. I have already made the adjustment. Objection number four requests the Court to infer, because Mr. Graves told the Palermo brothers that he wanted to conceal the source of it, that there is a criminal activity underlying the source of the forty thousand dollars. I am going to reject that notion, simply [p. 9] because the Government has insisted from the very beginning that it would not infer, allege, or offer any evidence as to the source of the forty thousand dollars. It is certainly possible that there might have been criminal activity involved in the forty thousand dollars. It is just as possible, however, that there was no criminal activity involved in the forty thousand dollars, and I don't think it is appropriate for this Court to sentence on the basis of possibilities.

Objection number five simply suggests an additional reason for adding another two levels regarding Mr. Graves' role in the offense. I reject that. I think the pre-sentence report accurately characterizes the role of Mr. Graves in this offense, and the fact that there was a Notary Public and a couple of witnesses doesn't add anything to the complexity or the sophistication or anything else of the offense. The Government misapplies the guidelines. So that objection is rejected. Objection number six is rejected. It simply suggests that the Government – it simply incorporates other objections, and the same thing applies to objection number seven, which is rejected. As to objection number eight, it simply suggests that the fact that [p. 10] Mr. Graves held the position of Secretary of the Louisiana Department of Transportation and Development during this period of time, from 1984 until March of 1988, that this might be a basis for an upward adjustment. The Court doesn't necessarily disagree with that position. I don't really think that that is an objection to the pre-sentence report, unless you consider the objection being that the probation officer should have suggested it as a possible reason for an upward departure. Again, I would concur that it may be a reason for an upward departure. Now, the Defendant's objection number one objects to paragraph nine of the pre-sentence report, which implies a connection between Graves' position and the offense which does not exist. You want to tell me what you are talking about, Mr. Unglesby?

MR. UNGLESBY: I apologize, Your Honor. Well, actually, I guess this is kind of tied in with your statement on paragraph eight.

THE COURT: Right, I have notes, and I distinctly remember the testimony of the Palermo brother. I get them mixed up. I forget who is Joe and I forget who is Anthony, but I distinctly recall the testimony elicited by the [p. 11] prosecution that Mr. Graves told one of the Palermo brothers my C.P.A. has already testified thus and such to the Grand Jury, be sure to tell your brother when he is called that he backs up that story. That may not be the exact words, but that is the import of it. So that is a sufficient basis for making that adjustment. So I will deny objection number one. Objection number two objects to paragraph twenty-two where the statement is made that he was the Secretary of the Department of Transportation and Development. Well, he was the Secretary. It is alleged in the indictment, and it was proved over and over again. It makes no difference as far as the sentence is concerned.

MR. UNGLESBY: That is my whole point. As long as the Court isn't taking the position that his public office was a part of this case, which you have already stated, then the objection is unnecessary.

THE COURT: The indictment does not allege that a public office was a part of this case. It did allege it in count two, which the jury acquitted him on, but not in count one. I have just said, however, as the Government noted in objection number whatever it was, it may be a

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No. 93-1212

SUPREME COURT, U.S.
FILED
APR 18 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

ROBERT GRAVES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

THOMAS M. GANNON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court's decision to grant the government's motion *in limine* was reviewable on appeal.

2. Whether the district court erred in enhancing petitioner's sentence for obstruction of justice under Guidelines § 3C1.1.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1212

ROBERT GRAVES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 5 F.3d 1546.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1993. The petition for a writ of certiorari was filed on January 18, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Louisiana, petitioner was convicted of conspiring to defraud the United

States and the Internal Revenue Service, in violation of 18 U.S.C. 371. The district court sentenced him to 21 months' imprisonment, to be followed by a three-year period of supervised release, and fined him $25,000. The court of appeals affirmed. Pet. App. 1-20.

1. Petitioner was Secretary of the Louisiana Department of Transportation and Development from 1984 until early 1988. During that time, petitioner owned an undivided interest in property located in Pike County, Mississippi. In 1985, petitioner met Joseph Palermo (Joseph), a businessman and member of the Louisiana State Mineral Board, who had been involved in the real estate business in the Lake Charles, Louisiana, area for approximately 18 years. The two men became good friends. Gov't C.A. Br. 7.

In late December 1986, petitioner telephoned Joseph, said that he had tax problems, and asked for help. Petitioner said that he had received certain funds, but did not want to reveal their source to the IRS. Petitioner suggested that property he owned in Mississippi could be used in some way to account for the money. Gov't C.A. Br. 7. Joseph told petitioner that he would think about the problem and get back to him. Because Joseph was on the Mineral Board, he did not want to become directly involved in petitioner's tax problems. Joseph's brother, Myron Palermo (Myron), agreed to help petitioner, however. The three men arranged to meet at Myron's house in early January 1987. *Ibid.*

At the meeting, petitioner and the Palermo brothers agreed to create backdated documents showing that petitioner had sold his interest in the Mississippi property to Myron's company, Three

Sisters Investments, Ltd. Petitioner furnished the dates and amounts of the payments that required documentation. Petitioner also furnished false, backdated receipts showing that between July 1984 and July 1986 Myron had paid $40,000 to petitioner. The three men agreed that false land sale documents would be created to identify Three Sisters Investments, Ltd., as the source of the payments to petitioner. At the end of the meeting, petitioner told Myron that if he ever needed anything, he should contact petitioner. Gov't C.A. Br. 8.

The next day, Joseph went to Myron's office where, in accordance with the agreement, additional documents were created. The documents were sent to petitioner in Baton Rouge, Louisiana, where they were signed by petitioner, witnessed, and notarized. Copies of the completed documents were returned to Myron and filed with his business records. Gov't C.A. Br. 8.

In February 1989, Myron was arrested for attempted distribution of marijuana. At the time of that arrest, law enforcement officers executed a search warrant at his place of business and seized, among other records, the documents created to assist petitioner. After Myron's arrest, he telephoned Joseph and asked Joseph to bail him out of jail. When Joseph secured Myron's release on bond, Myron told him about the seizure of the records related to the false land sale. Joseph relayed that information to petitioner. Joseph and petitioner agreed that petitioner should take some action. Gov't C.A. Br. 9.

Petitioner then traveled to Lake Charles, where he met with Myron. At petitioner's request, Myron wrote a letter to petitioner stating that Myron could

not make the scheduled payments on the Mississippi property, and that as a result Three Sisters Investments, Ltd., was returning the property to petitioner. Petitioner also furnished a quitclaim deed that Myron signed. In March 1989, the deed was filed with the Pike County Clerk of Court. Although no sale had ever occurred, the public record now reflected that petitioner had again become owner of the Pike County property. Gov't C.A. Br. 9.

Early in 1989, Milton Kelly, a certified public accountant, was preparing petitioner's 1988 individual income tax return. Petitioner told Kelly that $40,000 in proceeds from a land sale had been omitted from the return. Kelly used that information in the preparation of petitioner's 1988 return. Gov't C.A. Br. 9-10. In May 1989, while the instant offense was under investigation and after Kelly had testified before the grand jury, petitioner told Joseph what Kelly had told the grand jury about the Mississippi property. Petitioner asked Joseph to pass the story along to Myron so that Myron could tell the same story if questioned about it. *Id.* at 10.

2. Before petitioner's trial, the government filed a motion *in limine* that asked the district court to prohibit the parties from mentioning a paragraph in Myron's plea agreement with the United States Attorney that referred to a polygraph examination. The court offered petitioner an opportunity to place the paragraph before the jury, subject to the conditions that the court would give a cautionary instruction to the jury and that the witness would not be questioned further about polygraphs. Gov't C.A. Br. 3-4. During a pretrial status conference concerning the motion *in limine*, petitioner's counsel asked

to be permitted to introduce the provision referring to a polygraph examination, and that he be permitted to ask questions about polygraphs. The district court ruled that it would bar both sides from referring to the polygraph provision in the plea agreement, and it accordingly permitted the government to introduce a redacted version of the plea agreement. *Id.* at 4.

At trial, petitioner did not object when the government introduced the redacted plea agreement. After the prosecutor read the entire redacted plea agreement to the jury, he asked Myron whether he had "any other agreements with the Western District of [Louisiana]?" Myron said that he did not. Gov't C.A. Br. 26.

After petitioner was convicted, the probation officer recommended that petitioner's sentence be enhanced for obstruction of justice. The basis for the recommendation was petitioner's conversation with Joseph in which he told Joseph what Kelly had said to the grand jury, and then asked Joseph to relay Kelly's story to Myron so that Myron could tell the same story if questioned about it. See Presentence Investigation Report (PSR) ¶¶ 26, 38. Although petitioner objected that the evidence was insufficient to support the enhancement, see Addendum to PSR 5, the district court adopted the PSR's recommendation and found that there was a "sufficient justification" for the obstruction of justice enhancement. Sentencing Tr. 8.

3. The court of appeals affirmed. Pet. App. 1-20. The court assumed *arguendo* that the district court erred in allowing introduction of the redacted plea agreement, and that the district court's offer to admit the unredacted agreement under specified conditions

would not have cured the error. *Id.* at 7-8. It noted, however, that under *United States* v. *Estes*, 994 F.2d 147, 149 (5th Cir. 1993), petitioner's failure to renew his objection to the introduction of the redacted agreement at trial required the court to limit its review to plain error. Pet. App. 8-9. The rationale for requiring a renewed objection, the court observed (*id.* at 10), was to "allow the trial judge to reconsider his in limine ruling with the benefit of having been witness to the unfolding events at trial."[1] The court then found (*id.* at 11-12) that the district court did not commit plain error because (1) the inferences to be drawn from the polygraph clause could have credited as well as impeached Myron's testimony; and (2) the jury had before it abundant other evidence impeaching Myron's credibility.[2]

The court also rejected petitioner's claim that the district court erred in enhancing his Guidelines offense level on the ground of obstruction of justice. The court found that the district court did not commit clear error in making the adjustment. Pet. App. 17-

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[1] The court noted (Pet. App. 10 n.6) that while several circuits applied the same contemporaneous objection requirement that it did, other circuits had acted to "soften the rule." The court also suggested (*id.* at 12) that in another case en banc review of its rule on renewing objections to *in limine* rulings might be appropriate.

[2] Because petitioner did not object to the government's question concerning whether the redacted plea agreement was the "entire" plea agreement with Myron, the court reviewed that question for plain error as well. The court found no plain error, reasoning that any error in permitting the question was not so obvious that the court's failure to notice it would lead to a miscarriage of justice. See Pet. App. 13.

19. The court noted (*id.* at 18-19) that the district court could infer by a preponderance of the evidence that petitioner attempted to suborn perjury, and that petitioner's attempt to "influence" Myron's testimony may have violated the witness tampering statute, 18 U.S.C. 1512(b), though conduct need not violate that statute to satisfy the requirements of Guidelines § 3C1.1.[3]

ARGUMENT

1. Petitioner contends (Pet. 8-16) that the court of appeals erred when it ruled that he did not adequately preserve his objection to the admission of Myron's redacted plea agreement. Petitioner claims that the decision below is based on the faulty premise that rulings on motions *in limine* are tentative and subject to reversal during trial, Pet. 11-13, and that this Court should adopt a uniform rule dispensing with the requirement of an objection during trial to matters that were contested in pretrial proceedings, Pet. 8-11. Those contentions do not warrant review by this Court.

In *Luce* v. *United States*, 469 U.S. 38 (1984), the Court unanimously held that a trial court's *in limine* or preliminary ruling permitting the government to introduce certain evidence to impeach a witness is not reviewable on appeal if the witness does not in fact

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[3] The court of appeals also rejected petitioner's claims that the district court erred in denying his motion to strike language from the indictment (Pet. App. 3-5); in excluding rebuttal evidence that petitioner sought to introduce (*id.* at 5-6); in declining to excuse a juror whose husband was the victim of an assault during trial (*id.* at 14-15); and in failing to give petitioner's proposed jury instruction on the weight to be accorded the testimony of immunized witnesses (*id.* at 15-17).

testify. The Court reasoned that a reviewing court cannot weigh the evidence's probative value against its prejudicial effect without knowing the precise nature of the witness's testimony. *Id.* at 41. The Court also emphasized that an *in limine* ruling "is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the defendant's proffer. Indeed, even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous *in limine* ruling." *Id.* at 41-42. A concurring opinion by Justice Brennan emphasized that *Luce* left open the possibility of appellate review for rulings that turn on purely legal, rather than factual, considerations, since "[t]he appellate court's need to frame the question in a concrete factual context would be less acute, and the calculus of interests correspondingly different." *Id.* at 44.

Consistent with this Court's decision in *Luce*, the courts of appeals have held in a number of contexts that an *in limine* ruling is not reviewable on appeal when the defendant fails to object at trial, and thereby deprives the reviewing court of a specific factual record in which to assess the correctness of the ruling. See, *e.g.*, *McEwen* v. *City of Norman*, 926 F.2d 1539, 1544 (10th Cir. 1991); *United States* v. *Roenigk*, 810 F.2d 809, 815 (8th Cir. 1987); *Hendrix* v. *Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1504 (11th Cir. 1985). As the court of appeals noted (Pet. App. 10 n.6), however, some courts have also "soft-en[ed] the rule" in some contexts. See, *e.g.*, *United States* v. *Mejia-Alarcon*, 995 F.2d 982, 986-988 (10th Cir.), cert.

denied, 114 S. Ct. 334 (1993); *Greger* v. *International Jensen, Inc.*, 820 F.2d 937, 941-942 (8th Cir. 1987); *Palmerin* v. *City of Riverside*, 794 F.2d 1409, 1413 (9th Cir. 1986).

Petitioner errs in suggesting (*e.g.*, Pet. 8-13) that those differing approaches present a conflict requiring this Court's resolution. The cases that have ruled that an *in limine* objection was sufficient to preserve an issue merely recognize, as contemplated by Justice Brennan in *Luce*, that some legal rulings are unlikely to change when the district court is presented with a more concrete factual context, and that appellate review may not be aided by the particular factual context in which those rulings are made. As the Tenth Circuit put it in *Mejia-Alarcon*, an *in limine* ruling "preserve[s] an objection when the issue (1) is fairly presented to the district court, (2) is the type of issue that can be finally decided in a pretrial hearing, and (3) is ruled upon without equivocation by the trial judge." *Mejia-Alarcon*, 995 F.2d at 986.[4] That approach does not conflict with a requirement of a trial objection in those cases when a

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[4] Other cases on which petitioner relies do not conflict with the decision below for similar reasons. In *United States* v. *Sides*, 944 F.2d 1554, 1560 (10th Cir.), cert. denied, 112 S. Ct. 604 (1991), the court applied the same rule that the court of appeals applied in the present case. *Sides* therefore does not support petitioner's position. In *United States* v. *Sweiss*, 814 F.2d 1208, 1211 (7th Cir. 1987), there is no indication that the trial court was even presented with a pretrial motion *in limine*. Finally, although the court in *Cook* v. *Hoppin*, 783 F.2d 684 (7th Cir. 1986), did summarily address the issue raised in the petition, its approach is consistent with that taken in *Mejia-Alarcon* and similar cases. See *Cook* v. *Hoppin*, 783 F.2d at 691 n.2.

preliminary ruling, because of a heavy factual component, may be reconsidered as the trial unfolds.

The preliminary ruling challenged by petitioner was sufficiently fact-based and tentative that it would not be reviewable even under the *Mejia-Alarcon* analysis. The district court's ruling offered petitioner an opportunity to introduce the unredacted plea agreement upon certain conditions. Not only was petitioner free to change his mind at trial and accept the court's offer, but the court's decision to admit the evidence on some terms indicates that petitioner was free to argue that the trial record as it actually developed warranted a modification of the conditions. This was not a case, therefore, where it appeared at the outset that the district court had ruled without equivocation on the matter, or that the question was in fact finally decided prior to trial.

Even if the cases cited by petitioner are viewed as conflicting, this case would not be a good vehicle for considering whether a uniform national rule should govern the appealability of *in limine* rulings, because petitioner would derive no benefit from a rule permitting review of his underlying claim.[5] First, as petitioner conceded at oral argument in the court of appeals (see Pet. App. 11-12), the inferences to be drawn from the unredacted plea agreement might have supported Myron's testimony rather than im-

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[5] There is ground for doubting whether national uniformity is needed on the issue. It may be entirely appropriate for the courts of appeals, in the exercise of their supervisory power under Fed. R. App. P. 47, see *Thomas* v. *Arn*, 474 U.S. 140, 146-148 (1985), to reach varying conclusions as to the desirability of requiring defendants to develop factual records beyond the minimum requirements imposed by Fed. R. Evid. 103.

peached it. Second, and more important, the jury already had before it abundant information that impeached Myron's credibility. The information included Myron's guilty pleas to (1) conspiring to possess 2,000 pounds of marijuana with the intent to distribute it, (2) conspiring to defraud the United States through a money-laundering scheme, and (3) obstructing the United States Customs Service. The jury was also aware that Myron had received substantially lighter sentences for those offenses because of his testimony against petitioner, that Myron had lied to federal authorities about the documents at issue in petitioner's case, and that Myron had a reputation in the community for untruthfulness. See *id.* at 12. In addition, the district court reminded the jury of Myron's reputation for untruthfulness in its instructions. *Ibid.* In light of that impeaching information, the unredacted plea agreement would have been cumulative. The court of appeals thus reasonably concluded (*ibid.*) that "[i]t appears that, even under the normal standard of review, [petitioner] could not show reversible error." That determination does not warrant review by this Court.[6]

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[6] Petitioner likewise errs when he asserts (Pet. 13-16) that he satisfied the requirements of Fed. R. Evid. 103 for appellate review of his claim. No substantial right of petitioner was affected by the court's ruling, because petitioner was not entitled to cross-examine Myron concerning polygraph examinations. Not only was the impeachment value of that line of questioning cumulative, but the kind of polygraph-related information petitioner sought to elicit has generally been held to be inadmissible. See, *e.g.*, *United States* v. *Brown*, 720 F.2d 1059, 1072 (9th Cir. 1983); *United States* v. *Martino*, 648 F.2d 367,

2. Petitioner also contends (Pet. 16-19) that the district court erred in enhancing his sentence for obstruction of justice under Guidelines § 3C1.1. In support of that contention, petitioner claims (Pet. 16-18) that the government failed to present sufficient evidence to show that the testimony he sought to procure was false and material. That challenge to a factual finding in which both lower courts concurred does not warrant review by this Court. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317 n.5 (1985); *United States* v. *Doe*, 465 U.S. 605, 614 (1984).

In any event, the district court correctly concluded that petitioner's conduct warranted a sentence enhancement under Guidelines § 3C1.1. The entire point of petitioner's conversation with Joseph was to ensure that any testimony by Myron would be consistent with the fraudulent paper trail purporting to document the sale of petitioner's land, and thus to ensure consistency with the grand jury testimony of petitioner's accountant. As the court of appeals correctly noted (Pet. App. 18-19), the district court could therefore permissibly infer from the uncontroverted evidence of petitioner's conversation with Joseph that petitioner was attempting to suborn perjury by Myron or was otherwise impermissibly attempting to influence Myron's testimony. See, *e.g.*, *United States* v. *Armstrong*, 992 F.2d 171, 174 (8th Cir. 1993) (solicitation of false testimony supports enhancement); *United States* v. *Noland*, 960 F.2d

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390 (5th Cir. 1981), cert. denied, 456 U.S. 943 (1982); *United States* v. *Bursten*, 560 F.2d 779, 785 (7th Cir. 1977).

1384, 1391 (8th Cir. 1992) (same). See also *United States* v. *Powell*, 973 F.2d 885, 894 (10th Cir. 1992) (attempt to influence witness supports enhancement), cert. denied, 113 S. Ct. 1598 (1993); *United States* v. *Cherif*, 943 F.2d 692, 703 (7th Cir. 1991) (same), cert. denied, 112 S. Ct. 1564 (1992). The court of appeals thus properly concluded (Pet. App. 19) that the district court did not commit clear error in enhancing petitioner's sentence for obstruction of justice.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

THOMAS M. GANNON
Attorney

APRIL 1994

[7] Petitioner also relies on the commentary to Guidelines § 3C1.1, which provides that "[i]n applying this provision in respect to alleged false testimony or statements by the defendant, such testimony or statements should be evaluated in a light most favorable to the defendant." Guidelines § 3C1.1, Commentary (Application Note 1). Petitioner's reliance on that provision is misplaced. The basis for the enhancement was not allegedly false testimony or statements by him, but rather his attempt to obstruct or impede the investigation of his case by influencing Myron's testimony.